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Pakistan's Experience with Formal Law

An Alien Justice

OSAMA SIDDIQUE

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PAKISTAN'S EXPERIENCE WITH FORMAL LAW

Law Reform in Pakistan attracts such disparate champions as the Chief Justice of Pakistan, USAID, and the Taliban. Common to their equally obsessive pursuit of "speedy justice" is a remarkable obliviousness to the historical, institutional and sociological factors that alienate Pakistanis from their formal legal system. This pioneering book highlights vital and widely neglected linkages between the "narratives of colonial displacement" resonant in the literature on South Asia's encounter with colonial law and the region's post-colonial official law reform discourses. Against this backdrop, it presents a typology of Pakistani approaches to law reform and critically evaluates the IFI-funded, single-minded pursuit of "efficiency" during the last decade. Employing diverse methodologies it proceeds to provide empirical support for a widening chasm between popular, at times violently expressed, aspirations for justice and democratically deficient reform designed in distant IFI headquarters that is entrusted to the exclusive and unaccountable Pakistani "reform club."

OSAMA SIDDIQUE is Associate Professor at Lahore University of Management Sciences. He has previously worked as a transactional lawyer at two leading US law firms and as an advocate in the Pakistani appellate courts. His research articles have published in a number of international academic law journals.

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ABBREVIATIONS

ADB	Asian Development Bank
ADB PCNA	ADB Post-Conflict Needs Assessment
AJP	Access to Justice Program
APR	Annual Performance Review
BBLC	Bench-bar liaison committees
BJA	Baluchistan Judicial Academy
CCO	Civil Courts Ordinance 1962
CELE	Center of Excellence in Legal Education
CLA	Corporate Law Authority
CLT	classical legal thought
CRF	Conflict and Risk Framework
CrPC	Criminal Procedure Code 1898
DDA	Development Deficit Assessment
DFID	Department for International Development
DPRC	Development Policy Research Center
DSJ	District and Sessions Judge
EB	Enumeration Block
EC	European Commission
FATA	Federally Administered Tribal Areas
FILE	Fund for Innovations in Legal Education
FJA	Federal Judicial Academy
FOSI	Foundation Open Society Institute
FSC	Federal Shariat Court
GB	Governing Board
GMI	gross monthly income
HRCP	Human Rights Commission of Pakistan
IBAHRI	International Bar Association Human Rights Institute
IFI	International Financial Institution
ILO	International Labor Organization
KP	Khyber-Pakhtunkhwa
KPJA	Khyber-Pakhtunkhwa Judicial Academy
LEAPS	Learning and Educational Achievements in Punjab Schools

LEF	Legal Empowerment Fund
LJCP	Law & Justice Commission of Pakistan
LUMS	Lahore University of Management Sciences
MICS	Multiple Indicator Cluster Survey
MIT	Member of the High Court Inspection Team
MoL	Ministry of Law
MTBF	medium-term budgetary framework
NAR	Nizam-e-Adl Regulation, 2009
NJP	National Judicial Policy
NJPMC	National Judicial Policy Making Committee
NRB	National Reconstruction Bureau
NWFP	North West Frontier Province
OGC	Office of the General Counsel
OSI	Open Society Institute
PATA	Provincially Administered Tribal Areas
PBC	Pakistan Bar Council
PJA	Punjab Judicial Academy
PJDF	Provincial Judicial Development Fund
PMU	Program Management Unit
PPBS	planning-programming-budgeting systems
RFP	Request for Proposals
RFQ	Request for Quotations
ROL	Rule of Law
SAB	Shariat Appellate Bench of the Supreme Court
SCJ	Senior Civil Judge
SJA	Sindh Judicial Academy
SJP	Strengthening Justice with Pakistan
SOCT	Sector Coordination Team
SPSS	special statistical analysis program
TAF	The Asia Foundation
TEC	Technical Evaluation Committee
ToR	terms of reference
TRF	Transitional Results Framework
UNDP	UN Development Program
UNODC	UN Office for Drugs and Crime

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creation. Spreading out liability was, therefore, decidedly not the reason for my mentioning them. If anyone is to be sued – should someone be so tasteless as to contemplate the thought – it is solely me. Any aggrieved party can, however, always present a superior legal argument to rebut this disclaimer and go after all of them.

Osama Siddique, November 2012

Introduction

Objectives and structure of the book

This book is about the fascinating evolution of the contemporary Pakistani legal and court system through Pakistan's colonial and post-colonial history, the nature of its relationship with the society it sets out to regulate during these eras, its impact on ordinary citizens, the various attempts at its reform as well as their successes and failures, and its possible future shape and form. The book has three distinct but inter-related parts. It endeavors to determine: (i) background historical factors that have led to the current nature of the Pakistani legal and court system; (ii) its contemporary features and characteristics; and (iii) officially expressed and implemented intent for its reform as well as a critical evaluation of such reform endeavors. The analysis conducted in these parts then leads to certain projections about the possible future of the Pakistani legal and court system.

In the first part, Chapter 1 places the Pakistani legal and court system in its larger historical and sociological contexts. It explores the significance of such contexts for both understanding and reforming it. It evaluates its colonial antecedents and their continuing impact on the post-colonial polity. It traces, draws on and, hopefully, adds to the rich genealogy of sociology of law literature.

In the second part, the book maps and assesses the various distinctive features, constraints, and manifestations of the Pakistani legal and court system as "law in practice," and attempts to capture a variety of popular experiences with the same. Given the paucity of academic understanding of how this system actually works, it endeavors to adduce certain "facts" from its actual end-users. For this reason, it deviates from a conventional textual analysis of the laws and legal system. Instead, it employs modern social science research techniques of large individual and household surveys and detailed interviews with randomly selected respondents in order to understand the differential "in practice" impact of the Pakistani

legal and court system on diverse sections of Pakistani society in terms of their access to legal rights and remedies. In presenting a grassroots perspective as opposed to a top-down evaluation of the practice of law in Pakistani society, this section also proposes some approaches for future inter-disciplinary research in this area. Chapters 2 and 3 focus on these various themes.

The third part of the book then explores the phenomenon of law reform in general and reform of the Pakistani legal and court system in particular. In the Pakistani context, it maps and assesses the various institutional players who undertake reform, their internal perceptions and perspectives as to the state of the system, as well as major historical and representative recent attempts at reform. The book evaluates whether there is any correlation between what various sections of Pakistani society want, especially its more vulnerable groups, and whether the reforms respond to those needs; and, if so, whether the reforms have actually worked. It also analyzes whether what the people want can actually be delivered by legal/judicial reforms as currently visualized and designed and through those who control the reform process, or whether there are other vital political and economic avenues that are consistently ignored. The analysis marshals extensive evidence to propose how both the past and current "reformers" have perpetuated a fantasy that the system is being reformed – in the sense both of an illusion created by these reformers to detract attention from the real underlying issues which their reforms are never meant to address, and of their false and ill-guided belief that meaningful change can be effected through such superficial reform efforts.

This part of the book further endeavors to determine how the reform or "unreform" that is actually delivered is a function of the political economy and sociology of the reformers; as also of the growing role played by International Financial Institutions (IFIs) in funding and steering such reform. This in turn necessitates an analysis of the current directions of the international law and development discourse on "rule of law" reforms. Pakistan's experience with IFI-funded reform has tremendous relevance for this larger debate, as also for other post-colonial developing countries facing similar reform challenges. The book also conducts a comparative review with India in order to determine commonalities and differences in the reform approaches and outcomes. Chapters 4, 5 and 6 engage with these various important themes.

Juxtaposing the historical and sociological review of the Pakistani legal system as well as the overall findings from the first six chapters, Chapter 7

then offers some suggestions for future ways of thinking. It underlines the need to identify and pursue new and more promising directions for reform in order to bridge existing and ever-widening gaps between societal aspirations and expectations and the actual output of the Pakistani legal and court system.

Because of the relative unfamiliarity of the general international audience with Pakistan's scale, diversity, and complexity, the following introductory sections are intended to provide the larger politico-economic and sociological context of the country's legal and court system. These sections also underscore the value of a better appreciation of the Pakistani legal and court system, its impact on Pakistani society, and experiments at its reform, to a wide range of scholars, policy-makers, and policy practitioners in the area of law reform who look at other post-colonial polities in particular and developing countries in general.

Pakistan: a broad snapshot

Pakistan is an Islamic federal republic with a parliamentary form of government. Emerging from British colonialism in 1947, the world's sixth most populous nation, the second most populous Muslim country, the thirty-sixth largest sovereign state, and the seventh global nuclear power, has had a tumultuous experience with constitutionalism and democracy. Constitutions promulgated in 1956, 1963, and, most recently, in 1973 have been frequently abrogated or put in abeyance by military coups. The military has directly ruled Pakistan for almost half of its existence. As a result, elected governments have seldom managed to successfully see through their 5-year terms in office and deliver on their manifestos and reform programs.[1] Repeated failures to formulate and entrench a constitutional ethos have made it highly onerous for a new polity to address the various grievances of vast and diverse sections of society, and of the smaller provinces in the federation.[2] The consequent

[1] Pakistan's present government will actually be its first democratically elected political government to complete a constitutionally ordained 5-year term.

[2] Very interesting in this context is M. Khan, "Ethnic Federalism in Pakistan: Federal Design, Construction of Ethno-Linguistic Identity & Group Conflict" (June 1, 2012), http://ssrn.com/abstract=2185435. The article analyzes the phenomenon of ethnicization of politics and ethnic conflict in Pakistan through a distinct federal design approach to show how the coincidence of political power and ethnic identity within a federal structure may, in certain historical and socio-political conditions, exacerbate ethnicity-based conflict by disenfranchising sub-national minority groups in the political process.

dominance by a strong centralized executive; an extensive and elaborate colonial model of bureaucracy; and the fragility of political and societal institutions, structures, and processes, has perpetuated the continuation and domination of structures, imperatives, and modes of governance from the colonial era.[3]

At the same time, acute external challenges stemming from acerbic relations with neighboring countries and worsening geo-political instability in what is a highly turbulent region, have further taxed Pakistan's resources. They have contributed to a "security state" mentality propagated by a dominant military (the eighth largest standing army in the world) at the cost of uninterrupted pursuit of development goals and civilian institution building. Pakistan has fought three major wars with India in 1948, 1965 and 1971, over the disputed territory of Jammu and Kashmir (the last resulting in the separation of East Pakistan and its emergence as Bangladesh), and has been acutely strained due to the world's largest modern influx of refugees from the war, instability and the continuing anarchy that has plagued neighboring Afghanistan since the Soviet invasion.

Despite these enormous challenges, Pakistan cannot be categorized among the various African and Asian nations that have been witnessing the "Arab Spring" after decades of uninterrupted despotic rule. Though jolted by various dictatorial regimes that have undermined state institutions, political ethos, and social glue, and currently facing the brunt of the global challenge posed by violent radical movements, the Pakistani nation – whenever allowed any breathing space by its various endogenous and exogenous challenges – has shown tremendous promise and initiative. During such various brief "springs," nation-building has resumed through vibrant politics, economic growth, a vocal and growing civil society, a free media, business and social entrepreneurship, and various episodes demonstrating tremendous popular spirit in the face of national crises – most recently on display in the wake of the devastating 2005 earthquake in Pakistan's

[3] See O. Siddique, "The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and its Discontents," *Ariz. J. Int'l. & Comp. L.*, 23 (2006), 624–36. Apart from describing and discussing Pakistan's various experiences with martial laws, it focuses on the tussles between various political governments and a strong president bestowed with extraordinary powers to dissolve elected assemblies through constitutional amendments under a martial law. These tussles led to the dissolution of four elected governments from 1988 to 1996 and consequent political battles in the courts that led to several politicized and controversial decisions.

northern areas, and the popularly supported and sustained "Lawyers' Movement" to restore several appellate court judges illegally ousted in 2007 by General Pervez Musharraf.

Like other postcolonial states, Pakistan inherited several institutions, frameworks, and modes of governance. At the time of independence, two acts of British Parliament governed its new political framework: the Government of India Act 1935, an imperial holdover acting as provisional de facto constitution, which carried over the office and powers of the Governor-General, who represented the British Crown for purposes of the Government of the Federation; and the forward-looking Indian Independence Act 1947 that created a Constituent Assembly to perform legislative functions and, more crucially, to frame the country's first Constitution. Also inherited were several substantive and procedural laws from the colonial era, including, inter alia, its penal code, its contract act, its code of criminal procedure and its code of civil procedure, dating from 1860, 1872, 1898 and 1908 respectively. Over the years and during periods of democratic rule, sporadic legislation has been undertaken to update various inherited laws, rules, procedures and legal/administrative frameworks. However, in many significant ways, Pakistan's colonial past and its post-colonial present are contiguous eras that seamlessly flow into each other in the historical continuum. The aforementioned codes and many other laws continue to hold sway with minimal amendments and up-gradations. At the same time, the blue prints and building blocks employed by post-colonial reformers and policy-makers, as they attempt to develop and refine the Pakistani legal and judicial system, are essentially the ones left behind by the colonists.

In terms of a very broad structural snapshot – not dissimilar to court structures elsewhere – the Pakistani court system has two basic tiers. The constitutional and appellate courts that include the Supreme Court of Pakistan and four provincial High Courts are creatures of the Constitution. They are also referred to as the "superior courts."[4] The other tier, inherited from the colonial era, constitutes the "subordinate courts" or the "lower courts." These are established by ordinary legislation and operate as courts of first instance in the administrative districts of the

[4] See Constitution of the Islamic Republic of Pakistan, Zain Shaikh (1973), 4th edn. (Pakistan Law House, 2012), Art. 175(1). The Pakistani Constitution provides for the establishment of the Supreme Court of Pakistan at the federal level, and the High Courts at the provincial level (ibid.). A Federal Shariat Court was also set up in 1980 to deal with cases based on Islamic law (Art. 203C).

country.[5] The Constitution also allows for the establishment of additional courts, and over the years many special courts and administrative tribunals have been set up to provide avenues for adjudicating both regulatory and non-regulatory offences.[6] Quite apart from their jurisdiction in matters of constitutional interpretation, the decisions of the "constitutional courts" on questions of law and their enunciation of legal principles are, like in any common law system, binding and incrementally develop the law of the country.[7] Furthermore, the "constitutional courts" are empowered to undertake the overall judicial and administrative supervision and control of the "subordinate courts."[8] The other distinction, apart from their legal genesis and their placement in the judicial hierarchy, lies in the appointment and removal mechanisms, incentive structures, service rules, perceived social status, and operational autonomy for the appellate court judges, which is at a very different and elevated pedestal in comparison to the "subordinate courts." As a result,

[5] The "subordinate judiciary" or the district courts are established by and operate under frameworks provided by the Civil Courts Ordinance 1962 (CCO) and the Criminal Procedure Code 1898 (CrPC). The operation of District Courts under the administrative control of the District and Sessions Judge (DSJ) is governed through the provisions of the CCO and CrPC, rules thereunder and High Court Rules and Notifications. The District and Sessions Court is judicially and administratively the apex court for the district judiciary. The DSJ heads the District and Sessions Court, supported by a number of Additional District and Sessions Courts and judges. A Senior Civil Judge (SCJ) is administratively responsible for the Civil Judges-cum-Judicial Magistrates – who have both civil and criminal jurisdictions – and is answerable to the DSJ. In civil matters, the District Courts generally have original jurisdiction (as per the pecuniary limits) and also form the first tier of appeals in civil cases. In criminal cases, the Sessions Courts have original jurisdiction in serious criminal cases and hear appeals from the Magistrates' Courts. There are some differences in the structure, rules and pecuniary jurisdiction of the district courts across the provinces. See Dr. Faqir Hussain, "The Judicial System of Pakistan" (February 15, 2011), www.supremecourt.gov.pk/web/user_files/File/thejudicialsystemof-Pakistan.pdf. Dr. Faqir Hussian is the current Registrar of the Supreme Court of Pakistan and this report was presented at the Annual Judicial Conference in Islamabad in 2011.

[6] See Pakistan Constitution, Art. 175(1). These include, inter alia, the following courts and tribunals under federal and provincial jurisdictions: Accountability Courts; Banking Courts (Recovery of Loans); Special Courts for Banking Offences; Services Tribunals; Income Tax Tribunals; Anti Corruption Courts; Anti Narcotics Courts; Anti Terrorism Courts; Labor Relations Courts; Board of Revenue; Special Magistrate Courts; Consumer Protection Courts; Juvenile Courts; Family Courts; Drug Courts; Special Courts for Emigration Offences; Court of Special Judge (Customs); Revenue Courts; Rent Courts; Special Courts (Customs, Taxation and Anti-Smuggling); Environment Appellate Tribunal; Insurance Appellate Tribunal; Customs, Excise and Sales Tax Appellate Tribunal; Special Judges (Central); and offices of federal and provincial ombudsmen.

[7] Pakistani Constitution, Art. 201.

[8] Pakistani Constitution, Art. 203.

the "superior courts" attract a very different pedigree of aspirants in terms of education, quality of legal training and economic background, as compared to the talent pool available to the much less empowered and traditionally low-paid careers in the "subordinate judiciary."[9] The latter was also under direct executive control in the colonial era, though in recent years various steps have been taken to exclusively bring it under the judicial ambit. The Code of Criminal Procedure and the Code of Civil Procedure provide the basic procedural law for criminal and civil cases respectively, set out the judicial and administrative court processes and procedures, and empower High Courts to amend and augment them, quite apart from the avenue of legislative amendments of the same.

From afar, the Pakistani courts, like courts almost anywhere in the world, present a rich spectrum of litigation. The mode of litigation is adversarial. Court contestations range from disputes on multi-million dollar joint venture agreements or minority shareholder actions against proposed corporate mergers, to civil litigation over the rent of a small urban property or criminal trials for the theft of a herd of cattle. In theory, a variety of courts and tribunals are in place to address the multiplicity of disputes and issues that may emerge in a large, diverse, complex and vibrant society, and are legally accessible to all Pakistanis.

[9] The "constitutional court" judges are appointed by the President of Pakistan through processes laid out in the Constitution. Recent amendments have changed the process of appointment. This will be discussed in greater detail in the "Judging democracy" section below. See Pakistani Constitution, Pt. VII. Recently, in addition to the four provincial High Courts, a High Court has also been established in Islamabad. The District Courts exist in each administrative district of every province. Each town and city also has a court of Additional District and Sessions judge, which when hearing criminal cases, is called the Sessions Court, and when hearing civil cases, the District Court. The "subordinate judiciary" is appointed by the provincial governments under the Civil Servants Act 1973 and judicial service rules, thus constituting a special group of the provincial civil service. However, it is under the administrative control of the High Courts. Recruitment, promotions, discipline, removal, and other terms and conditions of service are dealt with under provincial civil service acts and rules, and candidates (both joining the service at the bottom of the tier and lateral candidates from the legal bar for higher positions) have to pass an examination. Whereas the "constitutional court" judges can only be removed through the Constitutional mechanism of the Supreme Judicial Council that comprises senior appellate court judges (and that has been very rarely utilized), the subordinate judiciary does not have the same security of tenure and can be removed by the supervising High Courts under standard civil service disciplinary rules. Also, the Supreme Court judges retire at the age of 65, and High Court judges at 62, unlike other jurisdictions where they hold office for life, until they voluntarily step down or become infirm. The retirement age for district court judges, however, is 60. There are no trials by jury in Pakistan, nor are judges elected to their positions.

For many Pakistanis, however, the appellate courts, in particular, are a vague and distant concept. Their legal battles are largely fought, if at all, in the district courts or the many special statutory courts and tribunals. In this regard as well, the situation is no different from any other modern legal jurisdiction where only a select number of meritorious cases of special significance make it all the way up to the appellate courts. This should, however, not lead to the assumption that real access to even the "subordinate courts" can be taken for granted for a vast majority of Pakistanis. Furthermore, many cases are appealed, the legal process is long and time-consuming and, quite frequently, civil or criminal litigation battles can extend for decades and go all the way up to the Supreme Court. This brief overview of the structure and nature of the Pakistani legal/court system presents many points of similarity with legal/court systems elsewhere. However, as one extends closer examination to Pakistani court battles, their venues, their culture and sociology, and their diverse cast members, certain striking features emerge. Though common to other post-colonial societies, they would be deemed novel elsewhere. The next section provides such a closer snapshot.

The post-colonial spectacle

If Jeremy Bentham's preserved, albeit headless, body at University College London – the so-called "Auto-icon" – was to be miraculously resurrected and induced to visit a contemporary Pakistani court, he would be well within his rights to feel a certain sense of déjà vu. After all, he famously prophesied acting as the "dead legislative" of British India, with James Mill acting as its "living executive."[10] If his brilliant disciple Thomas Babington Macaulay were persuaded to undertake a similar escapade, he would be somewhat taken aback. He would discover that his great handiwork, the Indian Penal Code of 1860, is still *en vogue*, its original spirit intact beneath the veneer of periodic piecemeal amendments. Both time travelers could be excused for thinking that they had not traveled at all. Both would immediately notice that in many respects,

[10] Quoted after the title page of E. Stokes, *The English Utilitarians and India* (Oxford University Press, 1982). At the very end of his ground-breaking work, Eric Stokes refers to Sir Alfred Lyall, who saw the colonial government in India approaching most nearly Thomas Hobbes's ideal of the Leviathan. The last sentence of Eric Stoke's book is: "A scrutiny of this Indian Leviathan, if depicted in the manner of Hobbes's frontispiece, would reveal Bentham's calm philosophic brow and James Mill's stern eyes of authority" (p. 322).

the Pakistani judges are at the center of an elaborate post-colonial judicial pantomime – a pantomime that is reminiscent of the colorful, intricate and complex colonial judicial spectacle in India.

Macaulay, while propounding the cause of establishing English as India's *lingua franca*, once declaimed: "In India, English is the language spoken by the ruling class. It is spoken by the higher class of natives at the seats of Government."[11] More than a century-and-a-half later, the official language of the Pakistani State, its higher classes, its courts (especially the appellate courts), its legislation, its administrative regulations, its law reports, and its cadres of successful lawyers, powerful bureaucrats and prominent NGOs, is English. However, that is not the language of the predominant majority of the clients, disputants, winners, losers, victims, beneficiaries and audiences in Pakistani courtroom dramas. They do not understand the language due to their very differential access to educational opportunities. Consequently, they have little or no comprehension of Pakistani laws and legal procedures. Like in a pantomime, they only have the benefit of looking at the judges' and lawyers' gestures and expressions, in order to decipher the unfolding stories that directly or indirectly impact and transform their lives. However, unlike a pantomime, there is no helpful background narrator's voice to explain to the audience what is going on. This is not surprising in a country where roughly a mere 3 percent of the population has a college graduate or higher qualification.[12]

[11] Minute by the Hon'ble T. B. Macaulay, February 2, 1835 (hereinafter, the *Macaulay Minute*). See www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html.

[12] Interestingly, the Supreme Court of Pakistan recently struck down the requirement of a bachelor's degree or equivalent qualification as a prerequisite for contesting elections in Pakistan. This requirement was introduced by General Pervez Musharraf through an amendment to the Pakistani electoral laws. Musharraf also attempted to introduce a similar requirement for becoming a member of a political party in Pakistan. Certain lawyers, including the author, in pro bono representations of certain veteran workers of political parties as well as labor unionists, with many years of political experience but no bachelor's degree, challenged the latter step in the Lahore High Court. The petitioners pleaded that political awareness and activism is not necessarily a function of holding a bachelor's degree. Furthermore, they argued that in a country with disparate and discriminatory access to education based on region, class and gender, such a restriction would disenfranchise almost 97 percent of the population from participation in politics. It would thus be violative of their constitutional rights to engage in political activity. While these challenges were *sub judice*, the Musharraf Government withdrew its proposed legal amendment. The bachelor's degree requirement for contesting elections, however, held sway until a recent Supreme Court judgment. It was often and widely criticized in public for the same reasons as the aforementioned reasons for the challenge to the proposed

Against the backdrop of this mute drama for the predominant majority of Pakistanis, I recall being a witness to an appellate court judge haranguing some junior police officers over certain due process violations. While berating them in English he repeatedly challenged them to explain the meaning of the words "*audi alteram partem*." All they could offer were some muffled words of apology in Urdu, while they nervously conferred with each other in hushed Punjabi. The moment was quintessential and far from being rare in Pakistani courtroom dramas. In his noble zeal to reform some policemen and his fond familiarity with English terms and Latin usages, the worthy judge seemed oblivious to the incomprehension writ large on the majority of faces in the courtroom – other than those with knowing smiles and an English legal education in their portfolios. It was like those quaint caricature drawings of judicial stereotypes that adorn the offices of well-heeled lawyers almost everywhere that display a fastidiously wigged and elaborately robed, red-faced and goggle-eyed judge, spouting fury at some befuddled wretches shuddering in their shoes. It would have been comic if it were not so tragic.

The above anecdotal foray merely illustrates the operational and everyday intimidatory and confounding dimensions posed by complex legal concepts and procedures in an unfamiliar language to average Pakistanis.[13] A glance back at India's colonial past further reveals that for the architects of the empire, choice of language was cardinal to the substantive contents of what it expected to impart. In post-colonial critiques of colonial Indian history, it is now almost clichéd to refer to Macaulay's famous 1835 Minute on Education. In this brief document, Macaulay roundly denounced the "admirers of the oriental system of education." He declared that:

bachelor's degree requirement for joining a political party. It faced further criticism as a tactic by Musharraf to exclude some veteran politicians from electoral politics.

[13] At a deeper level, languages draw their ethos, form, purposes, and continuing sustenance from civilizations, cultures, ideologies, value systems, and politico-economic models and their dialectics, as indeed they act as a mode of communication for the same. It is hard, therefore, to decouple a language from the sociology, culture, and imperatives of the legal and judicial system that employs it. Languages can obfuscate as much as they can clarify and communicate, which in itself can be a matter of political choice. When various Pakistani military dictators chose Marcus Tullius Cicero's "*Salus populi suprema lex esto*" or Hans Kelsen's "Doctrine of Revolutionary Legality" as doctrinal pretexts for regime justification at the price of constitutional abrogations, the deception was not just in the unfamiliar terminology. The larger conundrum lay in the cunning co-option of ethical and legal ideas from a very different context, both historical as well as conceptual, in order to serve a political agenda.

> [T]he dialects commonly spoken among the natives of this part of India contain neither literary nor scientific information, and are moreover so poor and rude that, until they are enriched from some other quarter, it will not be easy to translate any valuable work into them.

Then he proclaimed what was to become a throbbing barb in post-colonial discourses. He said: "[A] single shelf of a good European library was worth the whole native literature of India and Arabia."[14] Language, culture, knowledge, civilization and political agenda are thus inextricably tied up in the same diatribe. While advocating the necessity of introducing the English language and the "intrinsically superior" Western knowledge to India, Macaulay proposed:

> It is impossible for us, with our limited means, to attempt to educate the body of the people. We must at present do our best to form a class who may be interpreters between us and the millions whom we govern; a class of persons, Indian in blood and color, but English in taste, in opinions, in morals, and in intellect. To that class we may leave it to refine the vernacular dialects of the country, to enrich those dialects with terms of science borrowed from the Western nomenclature, and to render them by degrees fit vehicles for conveying knowledge to the great mass of the population.[15]

If this indeed was the colonial agenda, or at least a prominent strain thereof, at first glance the English speaking elite that drives Pakistani politics and government and that rules over the predominantly uneducated masses seems like a logical outcome. Having emerged from its colonial incubator, it has fulfilled the prophecy of an emergent "*babu*" class that has eventually graduated from mere "interpreters" to actual rulers. It is equally clear that it has not quite succeeded in equitably and widely sharing the boons of "knowledge," as Macaulay arguably tasked them to do. In the following sections I will further explore if Pakistani politicians, bureaucrats, army generals, judges, lawyers, intelligentsia and other members of its predominantly English-speaking ruling elite – who at one level are also members of a modern and cosmopolitan international fraternity – are essentially "Macaulay's Children." Or is this

[14] See the *Macaulay Minute*. Interestingly, Ramachandra Guha has recently argued that while the English still revere Macaulay for other achievements, few in England today know about his connection to the sub-continent. Ramachandra Guha, "Macaulay's Minute Revisited," *The Hindu*, February 4, 2007, www.hindu.com/mag/2007/02/04/stories/2007020400030300.htm.

[15] See the *Macaulay Minute*.

pejorative term unfair to the leaders of modern Pakistan, who have gleaned what was valuable and constructive from their country's colonial past, and are now steadfastly steering it in new progressive directions, wading through the inevitable morass of any post-colonial society?

The crisis of education

In the above context, the first logical area for further inquiry is the accessibility of education to Pakistanis, whether in English or in any of the local languages. A recent publication presents some shocking statistics on the state of education in the country, aptly describing it as an "education emergency." According to the statistics, one in ten of the world's primary-school-age children who are not enrolled in schools live in Pakistan. Thus, Pakistan is second in the rankings of countries with the maximum number of children not enrolled in primary schools – with at least as many as 7 million such children. Twenty-six countries are actually poorer than Pakistan and yet send more children to primary schools. Given this sorry state of affairs, there is absolutely no chance of Pakistan meeting the UN Millennium Development Goal for Education by 2015, to meet which such primary-school-age children should have started school by 2009. In comparison, neighboring India, Bangladesh and Sri Lanka are on target to meet this goal.[16] This is obviously linked to the fact that Pakistan's public expenditure on schools (as a percentage of its GDP) is currently less than 1.5 percent, whereas it is committed to spending at least 4 percent. While never adequate, such budgetary allocation has been steadily falling in the recent past – it fell from 2.5 percent in 2006/07 to 2 percent in 2009/10. Further, there is less than optimal utilization of even what little is actually allocated – last year, some of the provinces actually spent even less than 60 percent of their allocated budgets for education.[17]

Furthermore, with only 23 percent present enrolment in its secondary schools, Pakistan is even further away from its constitutional duty to extend free and compulsory access to education to all children up until

[16] See "Education Emergency Pakistan 2011," www.educationemergency.com.pk. This document succinctly collects and presents the latest statistics on the state of education in Pakistan from multiple governmental and international sources. Over the past 20 years Bangladesh has improved access to primary schooling at double the rate seen in Pakistan, whereas India is reducing the number of young out-of-school children at ten times the rate seen in Pakistan (ibid.).

[17] "Education Emergency Pakistan 2011."

the age of 16 – this constitutional right to education was recently introduced through the introduction of Article 25A to the Pakistani Constitution.[18] In other words, 25 million Pakistani children are currently denied this right. At current rates of progress, full primary school enrolment is a highly elusive goal. The following are the distant and highly disparate dates by which the Pakistani provinces are estimated to achieve full primary school enrolment: the Punjab – 2041; Sindh – 2049; Khyber-Pakhtunkhwa – 2064; and Baluchistan – 2100. As things stand, 30 percent of Pakistanis live in a state of extreme educational poverty, i.e. they have received less than 2 years of education. Meanwhile, the physical infrastructure of the state school system is crumbling. In terms of schools with no buildings or buildings in a dangerous state, the following are the statistics: the Punjab – 10 percent; Sindh – 35 percent; Khyber-Pakhtunkhwa – 23 percent; and, Baluchistan – 18 percent. Over 30,000 public schools require major repair or are in a dangerous condition; 21,045 have no buildings at all; and only 36 percent are considered to be in a satisfactory state and equipped with basic requisite facilities. Failure of the public school system is persuading many citizens to resort to private schools and *madrassas* of highly variable quality, many of which also suffer from various drawbacks and constraints. The one hopeful prospect in all this bleakness is that over the years, public opinion surveys show a progressively robust and increasing public demand for education and public faith in the capacity of a good education to improve and empower.[19]

Not only is access to education denied to so many, the deprivation strikes some much harder than others, as also shown above by the regional and provincial disparity in terms of access. For instance, the richest 20 percent of Pakistanis receive almost 7 more years of education than the poorest. This is quite apart from the fact that those at the very top can afford foreign education for their children. Almost half of the population of Baluchistan, the least-developed province, has received less than 2 years of education. Fewer than half of all Pakistani women have ever attended school. One in three of all women who live in the rural areas have never gone to school. Nearly two out of three of all children between the ages of 6 and 16 living in rural areas cannot read a story; while 50 percent cannot even read a sentence. Alarmingly, literacy for younger people is quite low, with 31 percent of men and 41 percent of women, between the ages of 15 and 24, unable to read or write. Less than

[18] See Pakistan Constitution, Art. 25A. [19] "Education Emergency Pakistan 2011."

one-third of the children who live in the rural areas of the Punjab can answer simple comprehension questions after reading a paragraph in Urdu. The number is likely to be even lower in less-developed provinces.[20]

This is quite apart from the fact that the mere adult literacy rate is now looked upon as an inadequate parameter for real access to political and economic empowerment. However, even on the basis of this inadequate parameter, Pakistan fares very poorly.[21] According to a 2009 USAID Education Factsheet on Pakistan, nearly 50 million Pakistanis (half the country's adult population) cannot read.[22] Moving on to higher education, college enrolment is also very low and there is great variation in access along parameters of gender, class and regional as well as urban/rural background. According to Pakistan's Ministry of Education's statistics (2005/06), there are 1,135 degree colleges in the country that offer a BA degree (4 years of college education after 10 years of schooling). During the aforementioned period, 325,993 students were enrolled in these institutions. If one divides that figure by Pakistan's estimated population of 164 million in 2007, it turns out that a mere 0.0019 percent of the population was enrolled in college. Access aside, the actual "quality" of education is widely divergent across provinces, in the rural and urban areas, and in public and private universities/colleges. The vast variation in the language used as the medium of instruction continues to create a much-resented, apartheid-like situation.[23] For present

[20] "Education Emergency Pakistan 2011."

[21] According to statistics generated by UNICEF, total "adult literacy" (which is defined as the percentage of persons aged 15 and over who can read and write) for Pakistan (2005–10) is 56 percent. Adult literacy rate of females as a percentage of males is 58 percent (2005–10). See www.unicef.org/infobycountry/pakistan_pakistan_statistics.html. It should be borne in mind that there is no standard definition of "adult literacy" provided by the relevant Pakistani Ministry of Education. A report commissioned by UNESCO states that Pakistan defines literacy as the "ability to read and write in any language." See www.uis.unesco.org/Library/Documents/gmr06-en.pdf, which provides several international and national definitions of literacy.

[22] According to a 2012 UNESCO report, as many as 50 million Pakistani adults lacked basic literacy skills in 2010. See www.uis.unesco.org/literacy/Documents/UIS-literacy-statistics-1990-2015-en.pdf.

[23] Pakistani schools/colleges/universities are popularly classified along the following lines: very expensive private schools that offer international curricula, well-paid teachers, excellent infrastructure, and the added bonus of a native British or American accent; a lower tier of private schools of varying quality with an exclusively English medium of instruction and foreign or local curricula and examination systems; an even lower tier of public schools of varying quality that use Urdu as the medium of instruction, teach some

purposes there is a vital nexus between access to education, especially education in English, and access to the Pakistani courts and its legal system, as shall be further explored in this book.[24]

Development, poverty, and disparity

Pakistan is a vast country (881,912 square kilometers) comprising various habitations of great antiquity, and tremendous geographical, topographical, historical, cultural, ethnic, sociological and linguistic diversity. The second largest economy in South Asia after India, the modern nation-state is still primarily an agriculture-based economy, though it has also shown progress in industry, trade, services and other sectors.[25] Pakistan's GDP in 2008 was $168.3 billion and its GDP per capita in that year was $2,444 (constant 2005 international $). However, statistics from the same period reveal that Pakistan lagged behind the larger India and the more or less equally sized Bangladesh in most economic development indicators, such as GDP per capita growth, Gross Capital Formation and Gross Domestic Savings. Furthermore, it also trailed some of the smaller

English, and follow an outdated curriculum and pedagogy; the lowest tier of public schools that use Urdu and regional languages as the medium of instruction and also lag far behind in terms of quality of teachers, facilities, pedagogy, and curriculum; followed by various types of *madrassas* or religious seminaries that sometimes offer some general education, apart from their primary focus on religious instruction. The Learning and Educational Achievements in Punjab Schools (LEAPS) Project has conducted extensive surveys on the quality of private and public primary school education in rural Punjab and provides valuable insights into multiple structural and qualitative challenges. See www.leapsproject.org/assets/publications/LEAPS_Report_FINAL.pdf.

[24] The district judiciary in Pakistan routinely uses Urdu as well as some regional languages in court proceedings and for some basic legal documents. However, the fact remains that the laws and regulations of the country as well as its reported case law are in English, and the higher one climbs in the court hierarchy, the advocacy and court proceedings are in English too. Translations of some of the laws in Urdu are asymmetrically available some of the time.

[25] In terms of sectoral composition of GDP, in 2008 agriculture constituted 20.4 percent, industry 26.6 percent, and services 53 percent of the GDP (all value added). In 2008, Pakistan's exports as a percentage of its GDP were 12.1 percent – joint lowest with Nepal among South Asian countries. See The Mahbub ul Haq Human Development Centre, "Human Development in South Asia (Trade and Human Development in South Asia)" (2009) (hereinafter, "Human Development Report 2009"), www.mhhdc.org/reports/Human%20Development%20in%20South%20Asia%202009.pdf. For additional details on the nature, structure, and state of the Pakistani economy, see "Annual Plan 2011–12: Planning Commission, Government of Pakistan" (hereinafter, "Annual Plan 2011–12"), www.pc.gov.pk/annualplan2011-12.htm; and "Pakistan Economic Survey, 2010–2011: Ministry of Finance, Government of Pakistan" (hereinafter, "Pakistan Economic Survey 2010–11"), www.finance.gov.pk/survey_1011.html.

nations in South Asia, such as Sri Lanka, Bhutan and Maldives, in GNI per capita, GDP per capita growth, Gross Capital Formation and Gross Domestic Savings.[26]

In terms of demographics, accurate statistics are hard to procure. According to the most conservative estimate, Pakistan's population in 2007 was almost 150 million, making it the sixth most populous country in the world. The bulk of the population lives in the rural areas, and the Punjab, Sindh, Khyber-Pakhtunkhwa, and Baluchistan are the most populous provinces in descending order.[27] Furthermore, its annual population growth rate is 2.1 percent, which is the highest in South Asia – the weighted average for South Asia in 2008 was 1.6 percent, and generally for developing countries was 1.4 percent. At this rate, Pakistan's population is expected to double by 2054, which is also the quickest predicted time frame for reaching that benchmark among the nations of South Asia.[28]

Although South Asia is generally afflicted with poverty and deprivation, confronts various developmental challenges and witnesses tremendous socio-economic disparity, comparative statistics reveal that Pakistan fares even worse than its struggling neighbors. For instance, 32.6 percent of the Pakistani population lives below the national poverty line (figures for the period 1999 to 2005). This is higher than all the countries in the region except Bangladesh, and also higher than the weighted average for

[26] See "Human Development Report 2009."

[27] See "Pakistan Demographic Survey 2007, Federal Bureau of Statistics," www.statpak.gov.pk/fbs/content/pakistan-demographic-survey-2007. The urban/rural split was 52,807,585 and 97,052,803; and the male/female split was 76,857,737 and 73,002,651 respectively. The population of the four provinces was: the Punjab – 86,448,706; Sindh – 33,463,705; Khyber-Pakhtunkhwa (formerly NWFP) – 21,292,421; and Baluchistan – 8,655,556 (ibid.). The overall population figure quoted in these official statistics is lower than other estimates, at least partially because these numbers do not include the population of various "special territories" under the Constitution such as the Federally Administered Tribal Areas (FATA), as well as military-restricted areas. The survey tells us that the population of these areas would constitute another 3 percent of the overall population. However, the survey also does not seem to include the population of other specially governed areas such as Azad Kashmir and Gilgit-Baltistan. According to an independent estimate, Pakistan's estimated population in 2008 was 177 million (see "Human Development Report 2009"). Another official source quotes a population figure of 166.52 million for the financial year 2010: see "State Bank of Pakistan Annual Report: Statistical Supplement, FY 2010" (hereinafter, "State Bank Annual Report 2010"), www.sbp.org.pk/reports/annual/arFY10/Stats/Chapter-1.pdf.

[28] See "Human Development Report 2009." Other useful sources for information on Pakistan's economic development indicators are "Annual Plan 2011–12" and "Pakistan Economic Survey 2010–11."

South Asia, which is 30.2 percent.[29] The rural population is distinctively worse off. During this period, while 24.2 percent of Pakistan's urban population was below the poverty line, 35.9 percent of its rural population faced that challenge. While the urban poverty figure is marginally better than the South Asian average of 24.7 percent, the rural poverty figure is actually higher than the South Asian average of 32 percent. Importantly, whereas rural poverty has fallen in other South Asian countries, in Pakistan it has actually risen from 33.4 percent for 1993 to 1996, to the aforementioned figure of 35.9 percent for 1999 to 2005. In terms of the "Income Share", i.e. the ratio of income of the highest 20 percent to the lowest 20 percent, during 2002 to 2005, it was 4.5 for Pakistan, which is better than some neighbors, but generally poor all across South Asia.[30]

Pakistan's performance is equally disheartening along other development indicators. In 2006/07, it had the joint lowest adult literacy rate, the lowest female literacy rate and among the lowest youth literacy rates in South Asia and as compared to the average for other developing nations – 54 percent adult literacy as compared to an average of 64 percent for South Asia, and 81 percent for developing countries; 40 percent female literacy as compared to an average of 52 percent for South Asia, and 75 percent for developing countries; and 69 percent youth literacy as compared to an average of 80 percent for South Asia, and 88 percent for developing countries.[31] The situation is equally abysmal when it comes to public health indicators. In 2007, Pakistan had the highest infant mortality rate in South Asia of 73 per 1,000 live births, as compared to the average of 55 in South Asia and 51 in other developing countries. It also had the lowest public expenditure on health as a percentage of GDP at 0.3 percent, as compared to the average of 0.9 percent for South Asia and 2.6 percent for other developing countries. Its Human Development Index (HDI) number in 2007 was 0.572 as compared to the South Asian average of 0.601 and the other developing country average of 0.691. Its Gender-related Development Index (GDI) number in 2007 was 0.532, compared with the South Asian average of 0.582. It also compares unfavorably with other South Asian nations and developing countries in terms of population without access to safe water and sanitation, child malnourishment

[29] However, Pakistan's comparative position improves if one looks at the percentage of the population living below the benchmark of $1.25 per day, due to different national poverty line standards in the region. See "Human Development Report 2009."

[30] "Human Development Report 2009." [31] "Human Development Report 2009."

and the "Human Poverty Index" (HPI), as well as various gender disparity and child survival and development profile indicators.[32]

Pakistan also faces acute internal disparities. While the majority of its population, according to statistics from 2008, still lives in the rural areas (113 million, as compared to 64 million in urban areas), as the analysis above shows, the rural areas face far greater developmental challenges.[33] Rapid urbanization, on the other hand, poses its own set of challenges – from 1995 to 2008 the growth rate of the urban population was 3.5 percent, which is higher than both the average for South Asian nations (2.7 percent) and other developing countries (2.8 percent). Within the country, there is tremendous regional disparity in terms of wealth and access to resources among the four provinces. The most acute economic growth and development challenges are faced by practically all of Baluchistan, various rural areas of Sindh, all the districts of Southern and Western Punjab, tribal areas of Khyber-Pakhtunkhwa and, finally, the entire Azad Jammu and Kashmir, Gilgit-Baltistan and the Federally Administered Tribal Areas (FATA), all of which are "special territories" under the Constitution. These areas are officially designated as the "Less Developed Regions and Districts" (LDRs).[34] Thus, the loci of economic and political power in Pakistan rest in urban political/governmental/large landholding and commercial/industrial elites from the Punjab and various major national urban centers like Karachi, Lahore, Faisalabad and Peshawar, and a very strong military that also has huge corporate interests. It is, therefore, not surprising that while an estimated 23 million Pakistanis faced undernourishment according to statistics from 2004 to 2006, Pakistan was the biggest spender on defense as a percentage of its GDP in 2007.[35] It also ranks highest in South Asia in the Global Militarization Index (GMI) and fairly high globally.[36]

[32] "Human Development Report 2009." [33] "Human Development Report 2009."

[34] See "Annual Plan 2011–12," ch. 18.

[35] "Annual Plan 2011–12," ch. 18. With an estimated army of 921,000 in 2007, Pakistan spent $4,217 million on defense in 2008 (at 2005 US$ prices). In 2007, Pakistan's defense expenditure as a percentage of its GDP was 3.1 percent, as compared to 2.5, 1.1, 2, 2.8, 2.4, and 2 percent respectively for India, Bangladesh, Nepal, Sri Lanka, the South Asian average, and the developing country average. It also had the highest per capita expenditure on defense in 2008 (at 2005 US$ prices) (barring what was at the time a war-torn Sri Lanka, which also has a much smaller population), which is $23.80, as compared to $20.90, $4.80, $4.80, $42.70, and $19.60, for India, Bangladesh, Nepal, Sri Lanka, and the South Asian average, respectively.

[36] See "Human Development Report 2009." The GMI represents the relative weight and importance of the military apparatus of a state in relation to society as a whole.

A beleaguered system of justice: condemnation and comprehension

A broad assessment of the overall size of the Pakistani formal court system reveals the following. Currently, 2,280 judges operate in different Pakistani courts. Of these, 121 are appellate court judges (for 158 sanctioned posts), 2,126 are subordinate court judges (for 2,565 sanctioned posts) and 77 are judges of special administrative tribunals under the control of the federal government (for 101 sanctioned posts).[37] Disaggregated district level data of the "subordinate judiciary" in the four provinces and the federal territory of Islamabad adds up to the following: the Punjab – 1,245 judges in 36 districts (as against 1,338 sanctioned posts); Sindh – 361 judges in 24 districts (as against 437 sanctioned posts); Khyber-Pakhtunkhwa – 367 judges in 24 districts (as against 446 sanctioned posts); Baluchistan – 132 judges in 18 districts/areas (as against 233 sanctioned posts); and Islamabad – 14 (as against 14 sanctioned posts).[38] When one looks at the officially sanctioned posts, one obvious finding is that there is a shortfall of judges in all four provinces. The unfilled vacancies are an outcome of acute supply-side constraints.

Militarization is defined, in a narrow sense, as the resources (expenditure, personnel and heavy weapons) available to a state's armed forces. Pakistan ranks 41 out of 151 nations covered by the index (ibid.). For further information, see www.bicc.de. For an overview of the scale and nature of the corporate and commercial interests of the Pakistan military, see A. Siddiqa, *Military Inc: Inside Pakistan's Military Economy* (London: Pluto Press, 2007).

[37] See "Supreme Court Annual Report" (April 2009 to March 2010), www.supremecourt.gov.pk/Annual_rpt_ap09mar10/6.pdf. The report does not provide statistics for judges presiding over special courts and tribunals under the control of provincial governments; nor was this data available from any other official sources. Therefore, the overall number of judges mentioned above is less than the actual overall number of all kinds of judges overseeing all Pakistani courts and tribunals.

[38] Data procured from the Law & Justice Commission of Pakistan in June 2011. It may be noted that the data originating from the High Courts of the different provinces is at different levels of aggregation, differently tabulated, and also has some variations in the categories/titles of judges who are considered part of the "subordinate judiciary." Furthermore, it invariably does not include judges of provincially administered special courts and tribunals. The overall total of subordinate court judges calculated from this data is 2,119, which is fairly close to figures obtained from other sources, such as the one cited earlier in this section, i.e. 2,126. Furthermore, the area of Azad Kashmir is a specially governed territory under the Constitution. Other specially governed territories of Gilgit-Baltistan were recently elevated to the status of a separate province. There are several other important differences of laws and governance mechanisms in these areas and, therefore, for purposes of the current analysis of the "mainstream" Pakistani formal court system, they have been excluded.

Since the district courts are where the majority of Pakistanis take their disputes, a province-wise per capita picture of the availability of district court judges would be illuminating. Using the most conservative statistics on provincial population, the following are the numbers of available district court judges for every 100,000 residents of a province: the Punjab – 1.5 judges; Sindh – 1 judge; Khyber-Pakhtunkhwa – 1.75 judges; and Baluchistan – 1.5 judges.[39] This reveals an acute nation-wide shortage of judges. Access aside, there are several additional challenges. There is no paucity of recent critical attention to the Pakistani legal/judicial system. In fact, more so than at any stage in Pakistan's recent history, reform of the legal/judicial system is a prominent and strident theme in its political, social and judicial discourse. The overall opinion is scathing – it does not work very well. The denunciation comes in a wide array of international evaluations; internal assessments by various Pakistani Law Commissions, as well as other local government and non-government agencies; and indeed, even in some judgments of the Pakistani appellate courts. For instance, the main policy document for a major USAID-funded justice sector reform project in Pakistan provides the following summation: "Legal experts and the public regard Pakistan's judicial system as weak, poorly administered, under-funded, insufficiently transparent, low in morale and burdened by exceedingly slow court proceedings."[40] Other evaluations point out acute and wide-ranging issues of delay, complexity, dysfunctionality, corruption, case overload, incompetence, lack of impartiality and overt discrimination that impair access to justice for the disempowered sections of Pakistani society.[41] A variety of reports

[39] Numbers rounded to the nearest quarter. The population figures for calculating these numbers are taken from "Pakistan Demographic Survey 2007." Furthermore, the numbers used are of all "subordinate court" judges, even though a portion of the same are not judges of the courts of first instance. Therefore, the number of available judges of the courts of first instance is even lower.

[40] See USAID, "Strengthening Justice with Pakistan" Request for Proposals, www.fbo.gov/download/f82/f825702026376a491b252180155ff40e/Pakistan_Justice_RFP_Final.pdf. The project was expected to be launched in 2009–10, but was shelved for reasons discussed below.

[41] USAID, "Strengthening Justice with Pakistan." See also C. Wadhams, B. Katulis, L. Korb, and C. Cookman, "Partnership for Progress: Advancing a New Strategy for Prosperity and Stability in Pakistan and the Region" (Center for American Progress, November 2008) (hereinafter, "Center for American Progress Report"), www.americanprogress.org/issues/2008/11/pdf/pakistan.pdf. See also "Crisis Group Asia Report No 160, Reforming the Judiciary in Pakistan" (October 16, 2008), www.ssrnetwork.net/uploaded_files/4248.pdf; Crisis Group Asia Report No. 86, "Building Judicial Independence in Pakistan" (November 10, 2004); Crisis Group Asia Report No. 137, "Elections, Democracy and

highlight institutional structural weaknesses, ineffectualness and politicization; inadequate oversight of the "subordinate judiciary" by the High Courts, due both to capacity constraints and lack of inclination; and the overburdening, under-resourcing, case backlog and prevalent corruption of trial courts. Some of the reports conclude that these limitations render the harsh but relatively swift and transparent parallel justice on offer by the Taliban and other militant groups in some Pakistani regions attractive to sections of the general population.[42] Some international evaluations stress the need to shift from pure "brick and mortar" reforms to training and human capacity building in order to tackle the aforementioned challenges.[43] Others emphasize, apart from their ubiquitous stress on underfunding and neglect of the judiciary, the various structural/political factors that contribute to violation of judicial independence and inadequate judicial accountability. They also call for the repeal of various laws that are discriminatory on the basis of religion and gender.[44]

Apart from the aforementioned systemic and legal/structural evaluations, various public perception surveys have focused on and reveal widespread lack of public faith among those who have actually accessed the courts, especially those belonging to the less privileged and more vulnerable groups in society. They divulge very low levels of public contact with the courts – only 8 percent of the respondents in one nation-wide survey reported any contact with a court in the last 5 years, with much smaller percentages for respondents from smaller provinces, female respondents, "vulnerable" households and households located in

Stability in Pakistan" (July 31, 2007); and Crisis Group Asia Briefing No. 70, "Winding Back Martial Law in Pakistan" (November 12, 2007). See also Government of Pakistan's National Reconstruction Bureau, "Social Audit of Governance and Delivery of Public Services: Baseline Survey 2002 – National Report" (hereinafter, "NRB Survey 2002"); Transparency International Pakistan, "Survey on Nature and Extent of Corruption in the Public Sector" (March 2002) (hereinafter, "Transparency Survey 2002"); Transparency International, "National Integrity Systems – Country Study Report Pakistan" (2003) (hereinafter, "Transparency Report 2003"); Transparency International Pakistan, "National Corruption Perception Survey" (2006) (hereinafter, "Transparency Survey 2006"); Transparency International, "Global Corruption Report 2007" (hereinafter, "Transparency Report 2007"); and "Human Rights Commission of Pakistan's Report 2003" (hereinafter, "HRCP Report 2003"), www.hrcp-web.org/showinter.asp?id=14.

[42] See Center for American Progress Report.

[43] See "The Next Chapter: United States and Pakistan, A Report of the Pakistan Policy Working Group" (September 2008), www.brookings.edu/~/media/research/files/reports/2008/9/pakistan%20cohen/09_pakistan_cohen.

[44] See the Crisis Group Asia Reports cited above in fn. 41.

remote locations.[45] The perception surveys also report widespread court-user experience of corruption in the courts, and rank the Pakistani judicial system as one of the most corrupt in the world.[46] A backlog of cases and delayed legal proceedings are frequently highlighted as major issues.[47] An acute perception of lack of judicial independence and neutrality is another prominent basis of critique.[48] Notably, in 2003, the "superior courts" came under scathing criticism by the Pakistan Bar Council (PBC), the national elected organization of Pakistani lawyers. PBC came out in public with its first ever "white paper" that strongly questioned judicial neutrality since General Musharraf's 1999 coup.[49]

[45] See NRB Survey 2002. Quite apart from the fact that they may have had no reason to go to court, or were fortunate not to be taken to court, this is attributable in part to lack of access. In terms of general perception about the purpose of courts, only 46 percent of the respondent households in this national household survey said that the courts were there to help them, with a lesser percentage of the respondents communicating such hopeful perception in the smaller provinces, in the rural areas, among the women and in the "vulnerable households" – though possibly also, in the opinion of the report writers, because fewer people in these categories were in a position to express a definite opinion due to their lack of exposure to courts. The most common reason advanced by those who did not agree with the observation that the courts are established to help people was that one needed money to get a remedy from a court. 51 percent of the households that had actual contact with the courts in the last 5 years expressed lack of satisfaction with the experience, with once again gender and "vulnerability" of the household acting as important contributing factors. See Government of Pakistan's National Reconstruction Bureau, "Social Audit of Governance and Delivery of Public Services: Baseline Survey 2004–05," which shows some improvement in the percentage of households that perceive that courts are established to help people, as well as in the percentage of households that had satisfactory court contact in the last 2 years.

[46] See Transparency Surveys 2002 and 2006. According to the 2002 survey, 96 percent of the respondents who had contact with the lower courts had encountered corrupt practices. In terms of popular public perception, 55 percent of the respondents in the 2006 survey described the judicial system as corrupt. The Transparency Report 2007 places Pakistan among a list of countries where, according to its survey, more than one in three recent court users had to pay a bribe. A higher percentage of people held on to the perception of corruption in the judiciary than those who actually reported having to pay a bribe. People put judges on top of a list of functionaries they are dissatisfied with. The list also contains lawyers, police, court staff, prosecutors, etc. Delay and backlog of cases is another recurrent theme in these reports. According to the 2007 report, more than 770,000 civil and criminal cases were pending in Punjab.

[47] See Transparency Report 2003.

[48] The most recent example is a report by the International Commission of Jurists that, inter alia, roundly critiques the increasingly political role of the Supreme Court of Pakistan and its rampant use of its special *suo moto* powers for indulging in the same. See generally "Report on the ICJ Mission to Pakistan" (autumn 2011) (hereinafter, "ICJ Pakistan Report 2011"), http://documents.icj.org/Pakistan_Mission_Report_30.03.12.pdf.

[49] See "HRCP Report 2003."

Thus, there is no absence of a critical discourse. But, as I shall argue in this book, problems emerge due to various common fallacies and untested assumptions that introduce serious flaws in the diagnosis of maladies and the prescription of cures. In other words, condemnation does not necessarily transcend mere description of the symptoms of a diseased legal/judicial system, to then convey probing comprehension of the nature, extent and causes of the disease, and especially the resulting acutely differential access to justice for Pakistani citizens.

Judging democracy

While the Pakistani legal/judicial system suffers from the aforementioned ailments, the overall contextual picture would be incomplete without reiterating that the Pakistani judiciary has historically played, and has often been put in extraordinary situations where it has had to play, a highly controversial role in military regime legitimizations and contentious adjudication of disputes between different pillars of the state.[50] Post Musharraf, the resurgent judiciary, supported by certain staunch sections of lawyers still reveling in the political limelight from the "Lawyers' Movement," has become a self-styled "national savior." It has displayed an increasingly invasive trend to encroach on the realm of the purely political and legislative.[51] In the American context, a lawyer- and judge-driven milieu characterized by "policy-making, policy implementation, and dispute resolution by means of lawyer-dominated litigation," described as "adversarial legalism," has been critiqued as problematic at various levels.[52] In a nascent and struggling democratic milieu, a highly

[50] See Siddique, "Jurisprudence of Dissolutions."

[51] The initial euphoria of the "Lawyers' Movement" and its contribution to, with the help of civil society and political party support, the restoration in 2009 of several appellate courts judges unconstitutionally removed by General Pervez Musharraf on November 3, 2007, is fast wearing off. Political and legal commentators are anxious about the invasive tendencies displayed by the restored judiciary. For growing criticism of the Supreme Court's adjudication of issues, which according to these commentators belong purely in the realm of parliament's legislative powers, executive action and public policy discourse, see, e.g.: A. Jamal, "Consistently Inconsistent," *The Friday Times*, March 12–18, 2010; K. Ahmed, "'Independent' or 'Powerful,'" *The Friday Times*, March 12–18, 2010; N. Sethi, "Anti-Status-quo Reform Needed," *The Friday Times*, March 12–18, 2010; and O. Siddique, "The Lawyers' Movement and its Fragments," Special Report – *The News on Sunday*, February 19, 2012.

[52] See R. A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2003), p. 3. Kagan describes the US legal system as "open to new kinds of justice claims and political movements." While it is conceded to possess

proactive judiciary, bent upon excessively taking on elected governments and questioning even the legislature's constitution-making powers, poses its own set of difficulties.

The appellate judiciary's current invasive trend was most prominently on display in the recent hearings of certain petitions before the Supreme Court of Pakistan contesting the Eighteenth Amendment to the Constitution that emerged after a year of transparent and rigorous debate and engagement between representatives of all the major Pakistani political parties. The Eighteenth Amendment introduced several changes to the Constitution, including amendments to Article 175 of the Constitution that lays out the process of appointment of appellate court judges. The creation of a role for parliament in judicial appointments was the primary source of the Supreme Court's ire.[53] This unwelcome trend of "Judging Democracy" emanates from historically resilient turf management by the judicial leadership of what it controversially considers to be its exclusive terrain, i.e. the judiciary and the justice sector.[54] The

certain advantages as it allows the judiciary to be flexible and creative and courts, lawyers, and litigation can act as a strong check against governmental arbitrariness and corruption, corporate excesses, and violation of individual rights, it has also been described as a "markedly inefficient, complex, costly, punitive, and unpredictable method of governance and dispute resolution." Kagan also asserts that it can "often deter the assertion of meritorious legal claims and compel the compromise of meritorious defenses," and "inspire legal defensiveness and contentiousness, which often impede socially constructive cooperation, governmental action, and economic development, alienating many citizens from the law itself" (ibid., pp. 3–4).

[53] Of particular consternation to various political and legal commentators was the Supreme Court's decision to actually admit petitions challenging the Eighteenth Amendment. Prior to this Amendment, appellate court appointments were made by the executive on the advice of the judiciary, and through a series of cases the judiciary had come to interpret such advice as essentially binding. The Amendment put forward a new two-level process for such appointments. For Supreme Court judges, for instance, nominations were to be made by a "Judicial Commission" that was to be headed by the Chief Justice of the Supreme Court. Most of its other members were to be senior judges, the few remaining ones being lawyers or legal representatives of the executive. A similar model was introduced for the other appellate courts. The nominations by the "Judicial Commission(s)" were then to be evaluated and final decisions about acceptance of recommendations made by a "Parliamentary Committee" comprising eight members of parliament, four each from the treasury and opposition benches. For the text of the Eighteenth Amendment, see http://criticalppp.com/wp-content/uploads/2010/04/report_constitutional_18th_amend_bill2010_020410.pdf.

[54] Various commentators described the Supreme Court's publicly expressed displeasure with the amendments to Art. 175 of the Constitution and its admission of petitions challenging the same, as falling outside its delineated responsibility to judge legislative and executive actions within clear constitutional jurisdictional paradigms. They declared

Supreme Court's decision to try and throttle a constitutional amendment can be questioned as legally unsound, and its possible modus as potentially disastrous. At worst, it was also possibly self-serving, as it was widely perceived to be motivated by its desire to salvage its previous ascendant control over the process.[55] Furthermore, this and other similar adventurism caused a considerable waste of public resources in court time, and distracted judicial attention from the various aforementioned ailments of the Pakistani court system that require urgent attention.[56]

its intrusion in order to judge the "constitutionality" of the Eighteenth Amendment as akin to judging democracy itself. "Judging Democracy" was the title of a recent issue of the largest selling English Weekly in Pakistan, wherein various commentators extended a very strong critique of this judicial trend. See, e.g.: K. Ahmed, "Wages of Imitative Activism," *The Friday Times*, September 17–23, 2010; M. Khan, "Towards a New Hegemony," *The Friday Times*, September 17–23, 2010; E. Haider, "Judicial Dues Ex Machina," *The Friday Times*, September 17–23, 2010; A. Jamal, "Politics of Judicial Appointments," *The Friday Times*, September 17–23, 2010; C. F. Hussain, "Extraordinary Judgments," *The Friday Times*, September 17–23, 2010; and O. Siddique, "Wasteland of Discourse," *The Friday Times*, September 17–23, 2010. See also ICJ Pakistan Report 2011.

[55] While trying to come up with a justification for adjudicating upon the fate of the Eighteenth Amendment, the Supreme Court divulged a proclivity to introduce the "Basic Structure Doctrine" to the constitutional framework, and also a greater role for Art. 2-A of the Constitution. Article 2-A was originally the preamble to Pakistani constitutions, controversially inducted later by the dictator General Zia-ul-Haq as an operative part of the Constitution, and widely criticized for its vagueness of purpose and language and its Islamic rhetoric. Many feel that it is too open-textured and ideologically parochial to be allowed to be used by judges as a constitutional litmus test. This proclivity was quite evident from the statements made in court by some of the judges during the hearing of the petitions. The ideas of the introduction of the "Basic Structure Doctrine" and a "*Grundnorm*" status for Art. 2-A were shot down by the Supreme Court in its jurisprudence of the 1990s. Their possible reintroduction is even more controversial today as they both carry the risk of entrenching an all-encompassing, over-powerful, and unaccountable judiciary. For a snapshot of the critique of possible reintroduction of these ideas into the Pakistani constitutional framework, see: C. Almeida, "Judicial Appointment Process under Fire," *The Daily Dawn*, September 5, 2010; S. A. Raja, "Bars to Amendment," *The Daily Dawn*, June 24, 2010; S. A. Raja, "Constitutional Conundrum," *The Daily Dawn*, May 25, 2010; and O. Siddique, "A Flawed Debate," *The Friday Times*, March 12–18, 2010. See also O. Siddique, "Across the Border – A New Avatar for India's 'Basic Structure Doctrine,'" and M. Khan, "Selective Borrowings," *Seminar: A Monthly Symposium, on 60 Years of the Indian Constitution (1950–2010)*, Seminar 615 (2010), 52–5 and 56–60 respectively.

[56] The "Eighteenth Amendment Case," as it came to be known, turned out to be the longest running constitutional case in the country's judicial history, in terms of number of hearings attended by the full bench of the Supreme Court. For present purposes, suffice to say that after much embroilment and growing public and political pressure, the judicial leadership finally conceded to the proposed principle of a two-tiered judicial appointment process, although there was still much contestation on details, process, ambit, and membership. A revised arrangement is now enshrined in the Nineteenth Amendment

Access to lawyers and the sociology of the legal profession

Despite the paramount importance of lawyers in an adversarial system of adjudication, the legal profession is acutely understudied in Pakistan. At the same time, meaningful regulation of the legal bars has been historically neglected. Hundreds of bar councils and associations exist at the Tehsil, District, provincial and national levels. According to some estimates, currently there are 89,624 lawyers enrolled to practice in different Pakistani courts. Of these, 43,964 are licensed to only practice in the district courts.[57] The actual number of active practicing lawyers is estimated to be lower, as many law graduates never practice or give up practice soon after fulfilling the not too challenging requirements of obtaining a law degree. However, even if we take these numbers to denote active practicing lawyers, it would be instructive to gauge per capita access to lawyers in diverse regions of the country. Using the most conservative population statistics, for every 10,000 Pakistanis there are 6 lawyers (who are enrolled to practice in all Pakistani courts) and 3 district court lawyers. Further, the following are the number of enrolled district lawyers for every 10,000 residents in the different provinces: the Punjab – 2.5 lawyers; Sindh – 2.75 lawyers; Khyber-Pakhtunkhwa – 5 lawyers; and Baluchistan – 2.5 lawyers. These very low overall numbers do not reflect the fact that within the provinces, actual access is dependent on proximity to towns and cities, and that many rural Pakistanis live in remote areas and hence face additional challenges in terms of access.

to the Constitution, introduced earlier in 2011, but there is little clarity or consensus on how the actual process will operate. The institutional battles are far from over. For the text of the Nineteenth Amendment, see http://pakistanconstitution-law.org/19th-amendment-2011/.

[57] Of these, 4,118 are advocates of the Supreme Court, 30,000 are advocates of the High Court in Punjab, 6,840 are advocates of the High Court in Sindh, 3,171 are advocates of the High Court in Khyber-Pakhtunkhwa, and 1,531 are advocates of the High Court in Baluchistan. There are 22,000, 9,214, 10,606, and 2,144 advocates of the "subordinate courts" in the four provinces, in the same order as above. See "Judicial System of Pakistan." A lesser overall figure of 81,209 lawyers is reported in the Supreme Court Annual Report (April 2009 to March 2010), www.supremecourt.gov.pk/Annual_-rpt_ap09mar10/13.pdf. The population figures for calculating these numbers are taken from the Pakistan Demographic Survey 2007. It should be noted that there is no legal professional distinction in Pakistan between solicitors and barristers as in the United Kingdom or any specialized legal bars as in the United States. Lawyers are often both solicitors and litigators, unless someone chooses to engage in purely advisory work or litigation. Furthermore, Pakistani lawyers often practice in all areas of law except for those who develop a specialization and a market reputation for the same.

In comparison, the following are the number of available lawyers per 10,000 residents of different countries: United States – 37 lawyers; Brazil – 30.5 lawyers; New Zealand – 25.5 lawyers; Spain – 25 lawyers; United Kingdom – 25 lawyers; Italy – 20.5 lawyers; Germany – 17 lawyers; and France – 7 lawyers.[58]

Historically, the legal bars in Pakistan have been highly politicized as well as politically divided. Other than inadequate emphasis on professional regulation, this is also due to the active role played by South Asian lawyers in the years leading up to independence – many of the most prominent leaders of the independence struggle such as Jinnah, Gandhi and Nehru, were lawyers. Further, Pakistani lawyers and lawyers-turned-politicians have been prominent in pro-democracy movements against military dictatorships, closely allied with political parties, and very active in national politics. Additionally, election to offices in legal bars or appointments to government positions in the Attorney General's or the provincial Advocate Generals' offices (which are invariably politically motivated), while maintaining close alliance with political parties, have been the successful routes of choice for aspirants to appointments to the "superior courts." These rich career incentives, as well as the active street mobilization potential of lawyers, convert bar council elections into mini-battles between various political/ideological factions. Further, election to bar offices is coveted not only due to the political leverage they provide, but also due to the public perception of such leverage, which in turn boosts clientele for elected officeholders of the bars.

With bar councils acting as political party strongholds or platforms for personal career advancement, standards for entering the bars and the professional and ethical regulation of the legal fraternity have been perennially weak. External interventions for bar reforms have been treated with great mistrust and strongly resisted, due both to an acute

[58] See http://wiki.answers.com/Q/What_country_in_the_world_has_most_lawyers_per_capita. It should be noted that these international figures indicate per capita figures which have been used to calculate for 10,000 residents. Further, they seem to indicate the total number of enrolled lawyers, while the provincial figures provided by me for Pakistan are only for district court lawyers. However, since district court lawyers constitute the bulk of Pakistani lawyers and the difference between the Pakistani and international figures is so vast, even the addition of Pakistani appellate court lawyers to the total numbers used for calculating these figures will not make much of a difference, as can be seen from the Pakistani national figures for all lawyers and district court lawyers. In any case, the lawyers enrolled in the Supreme Court cannot be demarcated according to provinces. Pakistani population statistics have been taken from the Pakistan Demographic Survey 2007.

paranoia stemming from Pakistan's experience with periodic attempts by military governments to use "reform" as a mechanism for "taming" lawyers, as well as various personal and group-vested interests within the lawyer community. Consequently, there are no credible bar examinations;[59] no continuing legal education and professional development programs;[60] and lackluster internal disciplinary mechanisms.[61] At the same time, the constantly increasing supply of largely ill-trained law graduates exerts tremendous pressure for keeping the entry barriers to the legal bars to a minimum. Paradoxically, while per capita availability of lawyers is very low, the low bar to entering the legal bars exposes the profession to overpopulation by lawyers lacking rudimentary skills and competence. Their growing numbers further augment inertia and resistance to raising standards. Professional pride and consequent commitment to maintenance of high professional and ethical standards, as also the economic imperatives to restrict the legal fee revenue pie to a select few, are primary motivations for maintaining bar entry standards in many countries. In Pakistan, however, the aforementioned political constituency-building imperatives have largely prevailed.[62] They have

[59] For instance, recently introduced bar examinations in Punjab fall well short of testing the candidates' proficiency in legal concepts and substantive/procedural laws. They exclusively focus on testing rote knowledge of some mechanical rules. Further, the pass rate of these exams is almost 100 percent, which is an indictment of their rigor. The situation is very similar in other provinces. These bar exams are also of very recent provenance, introduced as late as in 2005 in Punjab. Prior to that, unregulated clerkships for a period of time sufficed for obtaining the license to practice in the district courts. Induction into the High Court and Supreme Court bars has historically required an interview and additional scrutiny of eligibility. Over the years, lawyers of very variable quality, however, have managed to gain membership, not least because of frequent changes in the *ex officio* judges and bar representatives entrusted with such scrutiny. Standards and motivations vary to a vast extent among these individuals.

[60] Several endeavors in 2005/06 failed to start such programs in conjunction with the Canadian Bar Association due to lack of interest in and support by local legal bars.

[61] The lameness of these internal disciplinary mechanisms is a source of consistent public criticism. More recently, their laxness was exposed in several incidents where certain lawyers were involved in beating up some journalists, policemen, and even district court judges. Despite intense media scrutiny and public outrage, they were let off with very light punishments by the bar disciplinary committees that investigated these episodes. See, e.g. "Lawyers Again Rough Up Journalists," *The Daily Nation*, August 7, 2009, www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Politics/07-Aug-2009/Lawyers-again-rough-up-journalists. Such inglorious episodes are increasingly and consistently on the rise in the district courts.

[62] During 2005/06, the author interviewed several prominent officeholders of the Punjab Bar Council and the Lahore High Court Bar Association. They reported that a 1-year term for the officeholders meant that successful candidates were heavily reliant on the

eroded the space, culture and motivation for meaningful dialogue within the bars to assess their performance and the overall quality and direction of the legal profession.[63]

Especially but not exclusively at the district courts, local lawyer/bar alliances are also structured along ethnic and occupational caste lines. For many rural litigants, these can be significant criteria for choosing a lawyer, or their only common reference point for contacting and trusting one. In areas with low education and affluence, lawyers are often the only educated and connected people around. Their less privileged community members often rely on them for favors and advice. Furthermore, the legal profession is still dominated by small family firms. Sons often join or follow fathers into the profession, and utilize the common/inherited office, library, staff and clients. The bigger cities have scores of somewhat larger firms, and lately also some partnerships set up by young foreign law graduates that are not structured along kinship, and often offer specialized expertise. However, these are primarily not profit-sharing firms with career routes for new entrants to equity sharing partnerships along the standard US large law firm model, but purely cost-sharing arrangements. They operate in the upper echelons of legal practice (mostly corporate and commercial or high-end civil, criminal and constitutional work), and absorb a handful of the multitudes of law graduates entering the market every year. As to the vast majority of new law graduates, they essentially join senior lawyers as very low-paid apprentices, or strike out on their own and often remain briefless for many

votes of young law graduates seeking admission to the bar. Further, they regarded the short stint in office as highly inadequate for developing any longer-term vision of and stake in meaningful reform. Many also considered declining entry to the profession to any young law graduates as manifestly unjust in a country where many found seeking higher education elusive and expensive. Stringent entry barriers, they said, were tantamount to forcing unemployment on these candidates. There are additional reasons for the rapid influx of new lawyers into the profession. For instance, due to the low bar to entry, several civil servants also start practicing law after retirement. Further, a demonstrated aptitude for the law is not a necessary prerequisite for entry to the profession, as students who find the going tough in other fields of education often take up law as a less taxing alternative. They hope that with enough years spent in making the rounds of the courts, experience will make up for any inadequacies of law school training. For many, this prospect never materializes. Their association with the profession is essentially reduced to wearing the standard black uniform of Pakistani lawyers, sitting around the bar rooms, and participation in political agitation.

[63] Election canvassing during bar elections at various levels demonstrates the importance of political and even ethnic and caste associations in such elections to the candidates' prospects of success.

years. The development of law firms and creation of in-house positions in the public and private sectors have not maintained pace, and young lawyers report lessening exposure to training by senior lawyers as the profession continues to become saturated.[64]

In this context, the general state of legal education in Pakistan and the role of the lawyers vis-à-vis the same requires some attention. Pakistan has seventy-four law colleges, which are affiliated with sixteen universities.[65] Historically underfunded and ignored, state law schools in Pakistan have never presented conducive environments for the development of legal academy and quality local research. On the other hand, private law schools that started emerging a couple of decades ago have largely pursued profit and done little to raise the quality of education. While the absence of a legal academy has resulted in negligible improvement in teaching and research standards, it has also caused the larger national discourse on law, rights and justice to be poorer. Teaching at Pakistani law schools is primarily undertaken by practicing lawyers. Lawyers have also assumed a very prominent role in the regulatory oversight of legal education, the accreditation and evaluation of law schools, curricular design and standard setting. PBC thus occupies a role that is normally left to autonomous law schools, state regulators and academics. At the same time, the Higher Education Commission of Pakistan (HEC), which is the apex regulatory body for university education in the country, is also a claimant to this role. This conundrum arises due to the fact that two statutes were introduced at different points in time, empowering both the PBC and the HEC for this function, without any serious thought to the suitability and capacity of either for the role, or any attempt to rationalize overlapping jurisdictions. The PBC, while neglecting its primary function of regulating the legal profession, has always had the ascendant role in this confused milieu. However, jurisdictional confusion largely causes neither to play any meaningful role. Neither the PBC nor the HEC has demonstrated much capacity or will to address the continuing decline in legal education as genuine stakeholders.[66]

[64] This description is based on the author's experience of conducting research on legal education and legal bar reforms in Pakistan since 2005, which has involved regular interaction with various legal bars and law colleges.

[65] See Judicial System of Pakistan.

[66] See O. Siddique, "Martial Laws and Lawyers: The Crisis of Legal Education in Pakistan and Key Areas of Reform," *Regent J. Int'l L.*, 5 (2007), 95. The article conducts a historical review of various challenges and constraints faced by legal education in Pakistan. See also "Pakistan Rule of Law Assessment – Final Report – USAID Pakistan" (November 2008)

The formal law and the multiple normative frameworks

Although Pakistan's formal legal/judicial systems are largely facsimiles of their colonial antecedents, many additional sources of law and inspirations for administrative arrangements influence them, while also presenting and propagating several informal modes of dispute resolution. For instance, Mughal land regulations that were co-opted and somewhat transformed during colonial rule were then inherited by the post-colonial state; as were colonial hybrids of Islamic law and various types of local customary laws and mechanisms. Further, during different eras of post-colonial existence, certain sections of the judiciary have, at times, drawn on Islamic legal principles as a jurisprudential source and, especially in the early decades after independence, also extended support to some customary norms and mechanisms. Also inherited are various narratives of popular dissent against what have been popularly perceived by sections of Pakistani society as external and alien impositions in the garb of laws. There is a long and flourishing South Asian tradition, stemming from its colonial past and exacerbated by the weak polity and various administrative failures of the independent states, of celebrating the valiant "outlaw" and the conscientious "rebel," as protectors of the weak against the strong. Such indigenous Robin Hoods have significant contemporary relevance and appeal as icons of defiance against ongoing, at times legally sanctioned, tyranny. They are often depicted as the nemesis of the hegemony of landlords, politicians and industrialists, and their instruments of coercion: the judge, the civil servant and the police. Their exploits, real or fictional, are frequently celebrated in several languages in South Asian films, electronic and print media, popular fiction and street theater. The aforementioned mediums also at times engage in brutal satire and critique of the validity, fairness and efficacy of the formal legal/judicial system and the police. Their output finds appreciative audiences in those who continue to consider the formal legal/judicial system unjustly imposing and burdensome, especially during periods of truncated democracy, when official discourse and narratives blatantly suppress deviance and dissent.[67]

(hereinafter, "USAID Rule of Law Assessment"), pp. 27–9, http://pdf.usaid.gov/pdf_docs/PNADO130.pdf.

[67] See, e.g. F. Afzal-Khan, "Street Theatre in Pakistani Punjab: The Case of Ajoka, Lok Rehas, and the Woman Question," *TDR*, 41(3) (1988–), (autumn 1997), 39–62. Hundreds, if not thousands, of Indian and Pakistani movies have glorified the honest "outlaw" or the "angry young man" fighting the rapacious system. The movie "Bandit Queen," for instance, was a huge critical and commercial success. It was based on the life

At the same time, Pakistan's contemporary political discourse divulges growing yearnings in various quarters for a revival of traditional dispute resolution mechanisms such as the *panchayat* and the *jirga*.[68] Although this is a cursorily researched area, the few available surveys, as well as detailed conversations with several government officials, reveal the continuing importance of customary laws and traditions, especially in the rural areas; and also the prevalence of various traditional dispute resolution mechanisms which, though officially unrecognized, often work in conjunction with the formal legal system.[69] According to a recent study of rural disputants, almost one-third of those surveyed chose informal alternatives like *panchayats* for resolving their disputes. This was not because they perceived them to be necessarily always fairer than formal courts (indeed local status and power can and does influence their decisions), but because of their ease of access and lower cost. Furthermore, this study also reports that the formal and informal dispute resolution systems often complement each other rather than being mutually exclusive. Additionally, it emerges that in numerous instances the choice of courts as a forum is purely motivated by the fact that litigation is adopted as a tool for vindication or as a modus for defending, reclaiming or demonstrating prestige.[70] At times, even some mainstream justice sector

of Phoolan Devi, a famous female outlaw, who waged open war on upper caste Hindus and the state police for many years in the Indian state of UP. She was later elected to the state parliament.

[68] The *Pakistan Tehreek-e-Insaaf* (or "Pakistan Justice Party"), which is one of the increasingly popular new political parties, is one of the more regularly vocal exponents for state recognition, promotion, and formal regulation of various traditional dispute resolution mechanisms in order to replace corrupt and inefficient state courts.

[69] See, for instance, F. S. Khan and S. R. Khan, "A Benchmark Study on Law-and-Order and the Dispensation of Justice in the Context of Power Devolution" (Sustainable Development Policy Institute, May 2003). The "*Panchayat*" is a village council of elders, and a traditional Punjabi forum for dispute resolution in villages. Its counterpart in Sindh is called "*Faislo*." A popular and widely used dispute resolution mechanism in certain areas of Khyber-Pakhtunkhwa and Baluchistan comprises tribal elders and a jury of selected or all present tribesmen. It is referred to as the "*Jirga*." There are various permutations on these basic models all over Pakistan. In many parts of colonial India, the colonial rulers had to acknowledge the vast local popularity of customary laws and mechanisms and their clear preference over state-sponsored promotion of religious personal laws. This was particularly true for Punjab. See A. Jalal, *Self & Sovereignty: Individual & Community in South Asian Islam since 1850* (New York: Routledge, 2000).

[70] See F. S. Khan, *Quest for Justice: Judicial System in Pakistan* (Islamabad: Network Publications, 2004).

reform approaches acknowledge as much. According to one major international donor for justice sector reform:

> [T]he courts are used to delay decisions, to perpetuate a hierarchical social order, to protect vested or asserted interests, or to reinforce claims of prestige and "face" – motivations and interests better served by lengthy, drawn out processes rather than the efficient and fair resolution of disputes. It has often been said that laws in Pakistan are relevant mostly as the context within which negotiations between the state and individuals, or mostly between private citizens, take place. Other factors that come to play in these negotiations are the class, ethnicity, wealth, gender, religion/sect, social hierarchy and social networks of the parties.[71]

These important insights into some of the motivations that may influence choice of courts as the venue for contestations warn against the convenient assumption that a more efficient formal judicial system is the overwhelming and uniform demand of the disputing public, as well as the optimal solution to its grievances.[72] However, there are still some missing links – important components of the sociology of Pakistani disputes which require more nuanced analysis of their complex milieu. For instance, one cannot ignore the role played by kinship, territorial ties, group solidarity and social organization in the Pakistani rural context – especially since many of its conflicts are not between individuals but between groups, or are more recent manifestations of group feuds exacerbated by a long history of mutual grievances.[73] Equally important is an understanding of the more typical causes for and categories of disputes, which may have as much to do with conflicting material interests as with special cultural notions of "honor" and "dignity."[74]

[71] See "USAID Rule of Law Assessment." [72] See "USAID Rule of Law Assessment."

[73] See M. A. Chaudhry, *Justice in Practice: Legal Ethnography of a Pakistani Punjabi Village* (Oxford University Press, 1999), p. 10. The author emphasizes the value of examining the important social formation categories of *ghar* (nuclear or sometimes joint family), *khandan* (extended family), *sharika* (patrilineage), *biradari* (clan or lineage), *mohalla* (quarter or street), and *pind* (village) (ibid., p. 41).

[74] Chaudhry, *Justice in Practice*, pp. 42–81. The study has interesting observations on *zan*, *zar*, and *zamin* (women, money, and land) as the root causes of most Punjabi rural disputes and the further complications created by deeply held notions of *izzat* (honor), *sharam-o-haya* (shame and modesty) and *ghairat* (defense of honor and women). At the same time, another perspective posits some interesting insights into why certain defining features of the colonial regime endure in modern Punjab. A recent study on landed-property-based relationships, tribal kinship networks, and the logic of local politics in colonial and post-colonial Punjab, proposes, inter alia, that such features do not endure because they are embedded within the formal institutions of the postcolonial state, but rather because petty landowners elect those with an interest in preserving them. This is so

However, puritanical formalists with unflinching trust in exclusively statist solutions stridently decry any attempts to examine these social institutions and value systems as a step back into the dark ages – adhering to a faith system that visualizes and assumes a "perfected" full-fledged formal legal system as completely in accord with all of society's diverse normative aspirations. Given the sorry state of the formal legal system, it is difficult to justify this stubborn intellectual posture and ideological dogma – especially since it is increasingly apparent that significant parts of Pakistani society may prefer "alternatives" to what the state has to offer. A better understanding of the various growing tensions and divergences in Pakistani society is obviously necessary to more accurately decipher and comprehend any trends and themes of strident protest and outright rejection. There is arguably a real need to acknowledge and study within the Pakistani society, as Sally Falk Moore proposes in another context, small social fields of "semi-autonomy" that "can generate rules and customs internally," but that are "also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded."[75] Moore's primary insight is that "the various processes that make internally generated rules effective are often also the immediate forces that dictate the mode of compliance or non-compliance to state-made legal rules."[76] Thus, there ought to be a better understanding of these social processes and their internally generated rules, even if to specifically understand what it will take to make the existing formal legal system click.

The underlying purpose of this section was to highlight the existence of multiple but officially unrecognized normative frameworks and alternative mechanisms for dispute resolution in Pakistani society. It was not intended to attach a normative judgment to their qualitative output, at least not as yet. One is fully cognizant of the several standard critiques

even though, the writer contends, the strict terms of the laws may have undergone change through dramatic institutional reforms. Thus, he emphasizes the cultural dimensions of the study of legal change for a better understanding of what is displaced and what gets entrenched. See M. J. Nelson, "Making Sense of Property Rights: Land, Law, and Local Politics in the Punjab, 1849–1999," Unpublished Doctoral Thesis (Columbia University, 2002).

[75] See S. Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978), p. 55.

[76] Falk Moore, *Law As Process*, p. 57. The semi-autonomous social field is defined and its boundaries identified by a processual characteristic, the fact that it can generate rules, and coerce or induce compliance to them (ibid.).

against what are labeled as "traditional," "regressive" and "outdated" notions of "popular justice" or dispute resolution.[77] However, reality is surely less monochromatic than that and there is no way to really know unless one endeavors to find out. Any blanket indictment of alternatives would not only be undemocratic, even hegemonic; it would close important avenues of inquiry for better understanding the actual structure, dynamics, operation, preferences and demands of society – and equally importantly, its rejections. A blanket indictment would also shut out a significant realm of possibilities and solutions. It would essentially bring about what I describe next.

The dictatorship of no alternatives

Recently, Roberto Unger has aptly described the lack of intellectual ingenuity of national and international politics to move beyond the self-imposed constraint of choosing among existing models of political governance and economic growth, as "the dictatorship of no alternatives."[78] In an interesting parallel, law reformers in Pakistan seem afflicted with a self-imposed constraint while choosing models of law reform. The affliction of limited imagination precludes any exploration of alternatives on their parts – an exploration necessitated by the multiplicity, complexity and depth of challenges faced by the Pakistani legal/judicial system. This is particularly so given that, as discussed above: (i) Pakistan is faced with extraordinary socio-economic challenges, a crisis of education and acute disparities based on class, region, ethnicity, political leverage and placement on the rural-urban spectrum. These in turn have a grievously adverse impact on the legal empowerment and access to justice of its citizens, especially the less privileged ones. While other South Asian nations also face multiple developmental and

[77] The main arguments are broadly as follows: that such mechanisms and frameworks are pre-modern and hence inadequate to meet the requirements of a modern society; that they are oblivious to the great strides made in international and national laws and the resulting commitment to modern understandings of and consensus on human rights and civil liberties; that they may often be in violation of the constitutional ethos and values of the countries in which they exist; and that they are vulnerable to manipulability and are indeed manipulated for coercion at the behest of patriarchy, caste superiority, and class hierarchies to the detriment of the historically "vulnerable" classes, i.e. women, lower castes, religious minorities, and the poor. Hence, modes of "popular justice" may be constrained by the same social inequities of money, influence, honor, and prestige that constrain the formal justice system – often possibly much more so.

[78] R. Unger, *What should the Left Propose?* (London: Verso, 2005).

distributive challenges, Pakistan's problems are all the more acute, as it clearly trails the pack. (ii) Given their present ambit and outreach, the Pakistani courts and lawyer community are vastly inadequate to meet the needs of a large and rapidly growing population, and to meaningfully address escalating popular dissatisfaction with their performance. (iii) While non-court alternatives for dispute resolution and mechanisms for "popular justice" seem to attract the support and trust of many Pakistanis and increasingly gain new adherents, the formal system stubbornly refuses them any recognition whatsoever as quicker, cheaper and more intelligible options that can be utilized as possible vehicles for diverting some of the mounting caseloads in courts. (iv) Although various critical reports on and extensive evaluations of the justice sector in the recent past deliver a damning verdict on the current state of play, law reform activity seems to obliviously meander on with stock ideas, shunning any innovation. (v) Finally, in contrast to its neighbors, Pakistan has spent millions of dollars in foreign loans/aid on justice sector reform. The sheer dollar magnitude of this recent attention ought to have translated into deeper diagnosis, nuanced prescriptions and some positive results. However, there is little to report that is positive, as evidenced by the recent post-reform evaluations. Ironically, even radical anti-statist challenges over the past few years have not really offered anything beyond the extant "dictatorship of no alternatives," which also characterizes the Pakistani debate on legal reform. These themes shall be further analyzed in this book.

One such radical and violently agitated alternative was brought to international attention in 2009, as news of the unusual events in the valley of Swat in North-Western Pakistan hit the air waves. The Taliban-led militancy promised "speedy" justice through their brand of Islamic *Sharia* with which they announced they would replace the much reviled Pakistani formal court system; they remained largely reticent, however, about revealing the substantive ethos and facets of this *Sharia*. "Speed" and "reduction of delays" were their slogans of choice, as well as the entire table of contents of their proposed reforms. The same overarching terminology characterized the governmental amendments to the Swat system after the demise of the Taliban insurgency.[79] Quite remarkably this makes Maulana Fazalullah (the firebrand militant leader of the Swat Taliban) no different from Chief Justice Iftikhar Muhammad Chaudhry

[79] The Swat Taliban movement, its motives, and its eventual outcome are discussed in more detail in Ch. 6.

(the resurgent Chief Justice of the Supreme Court of Pakistan and the irrepressible icon of the "Lawyers' Movement"). Once restored, the Chief Justice made several promises of systemic reform, most notably those of "speed" and "delay reduction."[80] The National Judicial Policy 2009 (NJP) is the Pakistani judiciary's most prominent post-restoration articulation to put its house in order.[81] The NJP lays out some broad strategies for efficient utilization of existing resources, capacity building of the judicial organ, fast-tracked adjudication of important categories of cases and greater judicial accountability of the lower courts.[82] While it mentions the need to defend the more "vulnerable groups" in society, a closer reading reveals that it visualizes this to simply be the logical outcome of a more independent, better resourced and internally accountable judiciary. That is deemed sufficient. It does not emphasize any additional focus, greater urgency or special measures.

The mantra of "efficiency" also enamors a third, prima facie very dissimilar, participant in the Pakistani reform discourse, i.e. the international donor. The policy document of a recent USAID reform project

[80] See www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/conference-on-judicial-policy-ends-judges-asked-to-avoid-public-events-679. The "Lawyers' Movement" received tremendous international attention and was lauded for its role in the successful restoration of several appellate court judges illegally ousted by General Pervez Musharraf after his suspension of the Constitution and declaration of an emergency on November 3, 2007. This triggered a coalition of political parties, civil society, and media, and generated open debate on the role of the army in Pakistan's politics, as well as the plight of the country's frequently violated constitutional ethos. See Note, "The Pakistani Lawyers' Movement and the Popular Currency of Judicial Power," *Harv. L. Rev.*, 123 (2010), 1705. See also the following overviews and perspectives in the *Columbia Journalism Review* at www.cjr.org/behind_the_news/chaos_theory_1.php?page=all; in SCRIBD at www.scribd.com/doc/16530405/The-Pakistan-Centrifuge; and in *The News International Pakistan* at www.thenews.com.pk/daily_detail.asp?id=167582. See also: T. Carbasho and J. Pulice, "U.S. Lawyers urge Pakistani officials to restore country's Judicial Independence," *Lawyers J.*, 9 (December 2007), 4; J. A. Mintz, "A Perspective on Pakistan's Chief Justice, Judicial Independence, and the Rule of Law," *ILSA J Int'l & Comp L*, 15 (fall 2008), 1; S. A. Ghias, "Miscarriage of Chief Justice: Lawyers, Media, and the Struggle for Judicial Independence in Pakistan" in T. C. Halliday, L. Karpik, and M. M. Feeley (eds.), *Fates of Political Liberalism in the British Post-colony: The Politics of the Legal Complex* (Cambridge University Press, 2012); T. A. Qureshi, "State of Emergency: General Pervez Musharraf's Executive Assault on Judicial Independence in Pakistan," *NCJ Int'l L. & Com. Reg.*, 35 (2010), 485; and A. Kalhan, "'Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," *Vanderbilt Journal of Transnational Law*, 46 (forthcoming January 2013), 1.

[81] For the text of the National Judicial Policy 2009, see www.supremecourt.gov.pk/njp2009/njp2009.pdf.

[82] Ibid.

broadly stated its objective to: "Strengthen the Judiciary to achieve progress in Judicial Efficiency, Transparency, Accessibility, Independence and Accountability."[83] However, upon further review, "efficiency" of judicial operations, protection of "private businesses" and "foreign investments," and as a result, a flourishing free "market economy," clearly emerge as its essential underlying goals.[84] Arguably, "measurable progress that the public can readily see in reducing case delay; making courts more transparent, accessible and user-friendly; and, enhancing the independence, accountability and professionalism of judges and court personnel, while also addressing structural challenges to ensure sustainable impact," sounds sufficiently all-encompassing.[85] Ostensibly, the successful implementation of the aforementioned reforms would "help break the cycle of citizen mistrust and apathy toward the judiciary and assist the judiciary to better deliver justice."[86] However, as Marc Galanter aptly asks: "How might we expect such a utopian upgrading of the official machinery to affect the rest of our legal iceberg?"[87] This poignant question requires further thought.

Meaningful legal change, and not just the upgradation of the official machinery for greater speed of adjudication, is after all what the "have-nots" desperately seek in the Pakistani context. The capacity of the formal legal system to bridge the gap between "law in action" and "law in books," and to also address any inequitable distributive and

[83] This program was at the stage of inviting proposals from potential consultants at the time of writing. Its basic ambit and structure is officially stated in the formal "Request for Proposals" document (usually referred to as the RFP) at https://www.fbo.gov/download/f82/f825702026376a491b252180155ff40e/Pakistan_Justice_RFP_Final.pdf. Although it has been indefinitely shelved due to differences over its design and ambit between the Government of Pakistan and USAID, past experience shows that it may make yet another appearance in the future.

[84] RFP. Added anxiety and impetus for its stated goals is reflected in its highlighting the danger of further support for the Taliban model of justice in case of a complete breakdown of the existing Pakistani judicial system. The RFP warns against growing popular mistrust in the formal justice system as an invitation to obscurantist alternatives. It cautions: "Overall, the public lacks confidence in the justice system which undermines Pakistan's rule of law and contributes to rising violence, including crime, terrorism and human rights abuses. When people mistrust the justice system, the more likely they will look toward alternatives ranging from strict versions of Islamic law or taking the law into their own hands."

[85] RFP. [86] RFP.

[87] See M. Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review*, 9 (1974), 95–160, reproduced in D. Kennedy and W. W. Fisher III (eds.), *The Canon of American Legal Thought* (Princeton University Press, 1997), p. 531.

retrogressive social consequences of laws, has also been repeatedly questioned in contexts such as the American legal system; as has the formal legal system's own resistance to being utilized as an instrument of progressive social change.[88] The aforementioned Pakistani law reform approaches, however, while seemingly obsessed with enhancing the operational efficiencies of the extant system, invariably avoid any serious substantiation or exploration of an "instrumental" role for the law and the courts. They seem quite content to leave various significant, controversial and increasingly unpopular features of the legal system unreformed. This necessitates pondering the following insight:

> The unreformed features of the legal system then appear as a device for maintaining the partial dissociation of everyday practice from these authoritative institutional and normative commitments. Structurally, (by cost and institutional overload) and culturally (by ambiguity and normative overload) the unreformed system effects a massive covert delegation from the most authoritative rule-makers to field level officials (and their constituencies) responsive to other norms and priorities than are contained in the "higher law…" … Thus "unreform" – that is, ambiguity and overload of rules, overloaded and inefficient institutional facilities, disparities in the supply of legal services, and disparities in the strategic situation of parties – is the foundation of the "dualism" of the legal system. It permits unification and universalism at the symbolic legal and diversity and particularism at the operating level.[89]

Thus, quite apart from whether the official diagnosis of "inefficiency" as the primary aliment of the Pakistani justice sector is even accurate, or whether its legal/judicial predicaments are actually a function of more complex underlying social, political and economic tensions, several additional questions arise. For instance, has the highly expensive official reform process even achieved its narrow "efficiency" goals? Is achievement of operational efficiency sufficient panacea for deprivation and disempowerment – for injustice? Do the operators and reformers of the legal system visualize, and are they even capable of, the utilization of the laws/legal system to advance deeper systemic changes and address

[88] David Kennedy provides an excellent summary of the genealogy and variants of the critiques offered by the "Law and Society" Movements in the United States. See Kennedy and Fisher, *American Legal Thought*, pp. 483–9.

[89] Kennedy and Fisher, *American Legal Thought*, pp. 533–5. Galanter employs the term "dualism" to "refer to one distinct style of accommodating social diversity and normative pluralism by combining universalistic law with variable application, local initiative and tolerated evasion" (ibid., p. 533).

various societal inequities? Consequently, is the legal system ever actually imagined to be something different from what it currently is? Or does all the sound and fury of reform turn out to be the mere whimper of "unreform"? Additionally, does the formal legal system essentially and fundamentally preserve and reproduce existing politico-economic and sociological arrangements and realties? Finally, does it staunchly maintain its institutional, cultural and normative domination; bolster its frequently confounding systemic labyrinth; and thereby only pay lip-service to exhortations for real change from diverse segments of society? This book makes an attempt to answer these and various related questions.

1

The hegemony of heritage: the "narratives of colonial displacement" – the absence of the past in Pakistani reform narratives

Introduction

All the past and current approaches to legal reform in Pakistan adopt a starting point for their analysis that is located very late in the historical continuum that is directly relevant to Pakistani laws and the legal system. In these approaches, the received legal and judicial system firmly maintains the status of a timeless, changeless, universal and promising utopia gone slightly wrong. It is a utopia that is perceived as fixable through certain astute modifications and reforms. As a result, the response, by and large, of those who conduct, manage, control and dominate the legal reform discourse in and on Pakistan is at best tepid toward any suggestions of a departure, albeit not even a radical one, from current and established approaches. Any notions of a deep critical review of what is clearly old and crumbling are ironically considered anti-modernist, intellectually regressive, unrealistic and unpragmatic. Any attempts to frame a debate on the present ills of the "received" legal and judicial system in a historical and sociological context is deemed too broad, too academic, too un-lawyerly and too much of a distracting, irrelevant waste of time. This "de-contextualized," "ahistorical" and "unimaginative" approach is even more striking if one looks closely at some of the exciting debates in disciplines other than law.

Take history, for instance – a discipline perceived in the popular imagination as "unadventurous" – methodologically constrained as it is deemed to be in terms of time and scope by its dependence on primary sources that are as yet unearthed, understudied or forgotten – hidden away in archival recesses.[1] Historians, if anything, should be fairly sanguine about the carefully constructed edifice of received historical wisdom. They are, after all, not generally known to be awed and troubled

[1] B. Cohn, "An Anthropologist among the Historians: A Field Study" in B. Cohn, *An Anthropologist among the Historians* (Delhi: Oxford University Press, 1987), p. 4.

by the commotion and chaos of contemporary events. Rather, they are expected to fit and contextualize these events in careful theories built via measured analytical schema that stretch over decades, if not centuries. Instead of being caught up in the pulls and strains of everyday social and political conflicts, it is popularly imagined that historians can be found, like some retiring and introverted species, in "libraries and archives, class rooms, and their offices."[2] It has even been alleged that "most historical research is done because there is a known body of source material available," rather than deep interest in a problem, descriptive or theoretical.[3] Yet in recent years the relatively distant and detached seers of this staid discipline have displayed great ingenuity in questioning some established theories on South Asian colonial and pre-colonial history.[4]

The purpose of referring to some of the recurrent interesting debates in South Asian historiography is threefold: (1) It is to contrast the intellectual ferment on display in the historians' attempts at

[2] Cohn, "An Anthropologist among the Historians," p. 3.

[3] Cohn, "An Anthropologist among the Historians," p. 6.

[4] For instance, recent South Asian historiography that focuses on India's pre-colonial history of the controversial period between the fall of the Delhi Sultanate in 1398 and the rise of Mughal power in the sixteenth century has questioned the allegedly tyrannical character of Muslim rule, described in earlier histories as "despotism." It has highlighted hitherto overlooked aspects of considerable religious tolerance in the fifteenth- and sixteenth-century regional states, as well as the cross-fertilization of local cultures with the larger "Indic" and "Islamicate" ones. See C. B. Asher and C. Talbot, *India before Europe* (Cambridge University Press, 2006), pp. 84, 85, 104, 113. Another prominent theme of academic discord between historians of India has been the nature of India's political situation between the Mughal and the British empires – the debate between those who see "decline" and others who detect "decentralization." A new perspective now stresses that "it is important in any study of India between empires not to confuse the erosion of power of the Mughal court and army with a more general political, economic and societal decline." See S. Bose and A. Jalal, *Modern South Asia: History, Culture, Political Economy* (London: Routledge, 2002), p. 38. The other important debate between the old model of nineteenth-century historiography and more recent "revisionist histories" is on the extent to which the colonial Raj "invented" or "reinvented and reformed" "tradition" – in other words, whether there was any "change" under colonial rule, or did it denote "continuity" from the past. Contemporary research asks whether the disagreement is really about the "kind of social change" under the Raj, and given the "existence of multiple and occasionally contradictory social currents and cross currents," whether there is a need for "a finely tuned historical perspective as well as balance in attempts to assess the nature and direction of social change" (Bose and Jalal, *Modern South Asia*, pp. 60–1). Thus, this recent research encourages a greater need for periodization; greater focus on "complex interconnectedness of developments in economy and society"; greater attachment of importance to making a distinction between social change in rural interior and urban centers; and the greater value of a more nuanced appreciation of the social resistance to colonial rule (Bose and Jalal, *Modern South Asia*, pp. 61–9).

understanding South Asia with the unquestioning staleness of the legal policy discourse endeavoring to make sense of its present predicaments. (2) A more nuanced understanding of the past is surely relevant to making sense of the present. New insights can force one to revisit and question closely guarded assumptions, theories and "self-evident truths" about society – in particular a society regulated by laws and systems based on and influenced by these assumptions, theories and self-evident truths. Closer scrutiny may reveal them to be nothing more than biases, misconceptions and superstitions. (3) Finally, historians work in archives with lifeless materials. Lawyers and judges, on the other hand, work with living people. One would expect the latter to find it unavoidable to ignore what living voices have to say on a daily basis about the various travesties of the Pakistani legal and judicial system. Yet while historians of South Asia remain committed to excavating and piecing together the stories told by the echoes of long-dead voices etched in parchment, Pakistani judges, lawyers and law reformers seem intent on finding continuing meaning in the dead letter of the law, while covering their ears to block out the din of growing protest around them.

The fundamental objective of this chapter is to highlight the dramatic gap between Pakistan's largely "inherited" laws from its colonial legacy – in some cases intact in their original form, and in most cases molded in the colonial mode and ethos, even if promulgated after independence – and the common people of Pakistan. To the extent that this gap exists due to inaccessibility caused by language has already been pointed out. Operational shortcomings and service delivery breakdowns of the extant legal and judicial system, however, are not the preoccupation of this chapter, though they do foreground and justify its specific focus of inquiry. This chapter endeavors to explore the problems of deeper historical incongruity and incompatibility of the Pakistani laws and legal system with its society; a crisis of institutional inertia and disengagement with historical, cultural and social context; and the perpetuation of the hegemony of a formal legal system that is disassociated and delinked with its end-users. These fundamental issues, this chapter argues, are caused by and persist due to the fact that since its independence in 1947, the Pakistani justice sector discourse has essentially disengaged with and ignored the colonial context, ethos and antecedents of its legal and judicial system.

One could argue that the issues of access to justice caused by language difficulties could be potentially overcome by making laws more accessible in local languages. That, however, is insufficient panacea for the complex

and variegated nature of the problems identified by this chapter. Convinced or pretending to be convinced that the inherited colonial legal heritage was the triumph of modernity and evolutionary progress over the antiquated and fragmented remnants of the legal system(s) of a pre-colonial society; and unpersuasively proclaiming that, since Pakistan's independence, this heritage has been adequately indigenized and augmented to meet local aspirations as well as international standards, the custodians of the Pakistani reform process take several leaps of faith. These leaps of faith help evade and overlook an honest recognition that several levels of disengagement exist between the state rhetoric of legal empowerment, rights and remedies, and the common citizens' possession, comprehension and access to such empowerment, rights and remedies.

This chapter endeavors to expose the dramatic and escalating gap between the Pakistani laws/legal system and its people, by focusing attention on the history and public policy imperatives of these laws/this legal system. To that end, it identifies, analyzes, categorizes and explains the diverse multi-disciplinary critiques of India's experience with colonialism, and the resulting purpose, nature and impact of its laws and legal system. This is the impetus behind the definition and description of what I call the "narratives of colonial displacement." Further, this chapter offers a methodology for evaluating and gauging the merit of the diverse perspectives and insights that constitute the "narratives of colonial displacement," by distinguishing and discussing three ideologically and thematically distinct narrative categories therein, i.e.: those that make the "desirable modernization argument"; those that make the "inevitable modernization argument"; and those that make the "radical displacement argument."

In this chapter, I contend that enamored as the custodians and controllers of the Pakistani reform discourse are with the first two ubiquitous and uncritically accepted positions, they resolutely ignore the vital third argument. The "radical displacement argument" deeply probes and forcefully questions the colonial legal project in India and mandates critical evaluation of its continuing impact on the South-Asian post-colonial states. This makes its willful avoidance or genuine ignorance both self-defeating and unpardonable. Before embarking on a detailed discussion of my three proposed categories of the "narratives of colonial displacement," I further elaborate on the need for a sociological perspective for diagnosing the real problems of the ailing Pakistani legal and judicial system. Unless the current reform gaze on the Pakistani legal and

judicial system is broadened to encompass the societal context in which it exists, any dazzling reformative revelations are highly unlikely. On the other hand, myopia leading to complete blindness is much more likely to occur.

The "narratives of colonial displacement"

"Remembrance of things past": what do the post-colonials miss about their pre-colonial past, if anything?

To say that British laws, regulations, legal culture and norms were "alien" to India would be stating the obvious.[5] I shall shortly elaborate on the several differences of style, substance and ethos that made them "alien," as emphasized by the "narratives of colonial displacement." Whether they remain "alien" and, more importantly, whether they continue to "alienate" and are unacceptable to vast sections of post-colonial South Asian nations due to their being "alien" is a more contentious assertion. This has great contemporary relevance of course. It raises the related question of whether what has been around for several generations can still be considered "alien" and popularly unacceptable – the notion of its "alienness" determined by benchmarking it against distant and faded stories of another time and dispensation. After all, one could reasonably argue that a century-and-a-half of British rule would have been untenable if there had been no concomitant change in the Indian people's reception of British laws. To argue the contrary would be tantamount to asserting that there was no osmosis, no absorption, no conscious and sub-conscious acceptance of these laws – as not just inevitable and compromise laws, but perhaps, at times and in certain instances, as even good laws. Would not the sun have perhaps set much earlier on the Empire – of which it was proverbially said that

[5] I use the term "alien" here in the ordinary dictionary sense of "outside somebody's normal or previous experience and seeming strange and sometimes threatening." Similarly, I use the term "alienation" in the ordinary dictionary sense of "to make somebody feel that he or she does not belong to or share in something, or is isolated from it." In other words, I am not using "alien" or "alienation" in the particular sense ascribed to these terms by Karl Marx. (See K. Marx, *Early Writings*, trans. R. Livingstone and G. Benton (London: Penguin Books, 1975).) Neither am I referring here to the sociological concept of "anomie" resulting from a breakdown of a normative order, in the sense postulated by Emile Durkheim. See E. Durkheim, *Suicide: A Study in Sociology*, trans. J. A. Spaulding and G. Simpson (New York: The Free Press, 1951).

"the sun never sets on the British Empire" – had the native subjects not wanted to bask a little longer in its sunshine?

I shall, therefore, attempt to approach the "narratives of colonial displacement" while steering clear of an essentialist moral indictment of colonial laws as perennially evil laws, introduced as they were, if one takes that position, under an imperative of domination and exploitation. Surely, these laws did not exist in a vacuum and through sheer shock and awe. One could argue that there were likely to be – and indeed it has been argued in Christopher Bayly's seminal work that there were – collaborators, beneficiaries, allies and even converts during the complex period of transition from what he calls a crumbling Mughal empire and its indigenous states to a mature colonial state.[6] This perspective on the nature and degree of impact of colonial rule on indigenous Indian tradition asserts – as part of the well-known "change/continuity debate" in Indian historiography mentioned earlier – that colonial rule did not drastically change the basic structure and purposes of the pre-colonial tradition. Others have similarly asserted "continuity" at several levels of Indian polity and society in order to maintain that colonial knowledge of the colonized, and the resulting colonial rule, was not a unique colonial invention. It was in fact the product of collaboration between European rulers and their "chosen and trusted indigenous informers."[7] It is not unreasonable to consider that the dismantling Mughal governance framework and its particular patronage and dispensations did not perhaps hold the same attractions and romance of a *Belle Époque* for everyone in India. After all, there were bound to be victims, critics, detractors and dissenters. Also, the daily plight of many was too far removed from the benevolent gaze of the imperial Mughal *durbar* for them to really care either way. However, others may have and indeed did care. While many may have considered the brutal removal of the last Mughal emperor Bahadur Shah Zafar by the British East India Company as the death of a glorious era,[8] others were as likely to have considered it as a new dawn, or more cynically, as the replacement of one type of

[6] C. A. Bayly, *Rulers, Townsmen and Bazaars: North Indian Society in the Age of British Expansion 1770–1870* (Cambridge University Press, 1983).

[7] R. O'Hanlon and D. Washbrook, "Histories in Transition: Approaches to the Study of Colonialism and Culture in India," *History Workshop J.*, 32(1) (1991), 110–27.

[8] For instance, there are many evocative references to this traumatic era in the poetry of the great Urdu poet Mirza Asad Ullah Khan Ghalib, a resident of Delhi during the tumultuous years surrounding 1857, as indeed in the writings of many others who formed the city's social, cultural, and literary elite.

despotism with another. Nevertheless, the grand, elite-focused narratives of Indian history have traditionally neglected their views, attitudes, rhetoric, discourses, actions and reactions to the massive historical drama being played around them.[9]

The aforementioned "continuity thesis" and its related emphasis on "Indian Agency" is of course deeply contested by other voices in South Asian historiography, which have a different take on the state of stability or decline of the pre-colonial state and society in eighteenth- and nineteenth-century India. This influences their perspectives on the extent to which colonial rule actually changed the structure and functions of pre-colonial traditions; the levels of cooperation or opposition by local elites and power groups to colonial expansion; and the resulting impact on the power, nature and form of the emerging colonial state during that period.[10]

Although the "change/continuity" debate is relevant to a better appreciation of what Indian society underwent during the colonial era, I want to avoid being confined by the notion that a people can only hold highly subjective and relative value judgments about the justness and goodness of the colonial legal system, while using its predecessor as a litmus test. A people can also independently gauge a legal system along several other parameters, such as its accessibility, fairness and consistency with popular notions of what is good and just. At the same time, while it is helpful to consider laws as a "legal order," as "the aggregate of laws or legal precepts, the body of authoritative grounds of judicial and administrative action in such a society," as "the judicial process" and as a combination of all three formulations,[11] it merits questioning whether that is quite sufficient in the present context. In other words, can we employ the word "law" in a sense that is devoid of any social, cultural and emotional associations in the popular imagination? Therefore, it is important to ask whether colonized Indians gauged the displacement of their old legal order in a purely utilitarian sense; or did they perceive complex and important ideological, political, ethical, cultural and emotional

[9] In several important ways, the Subaltern Studies Group shifts the focus from grand narratives of Indian history and its elites to its subalterns. This "history from below" reveals the important role played by Indian non-elites as agents of social and political change. See, e.g. G. C. Spivak, "Subaltern Studies: Deconstructing Historiography" in R. Guha and G. C. Spivak (eds.), *Selected Subaltern Studies* (Oxford University Press, 1988).

[10] M. Athar Ali, "Recent Theories of Eighteenth Century India," *Indian Historical Review*, 13 (1986–7), 102–8.

[11] R. Pound, "A Comparison of Ideals of Law," *Harvard Law Review*, 47(1) (1933), 1–17.

associations between the displaced legal system and an earlier social, economic and political order? If the latter was indeed the case, did this then play a role in the nature of their reception of the colonial legal order? To put it in Weberian terms, it merits questioning to what extent "formal irrationality" and "substantive irrationality" played a role in the legitimization of the pre-colonial legal order for the Indian populace, and thus also influenced the exogenous and endogenous reasons that impacted their interface with the colonial legal order?[12]

A case for the necessity of a sociological insight into law

I have already stated that my underlining the necessity for a closer look at the past in order to understand the discontent of the present ought not to create the misleading impression that I am essentially leading up to the argument that colonial laws were necessarily problematic as they were the result of "alien" rule and legislation. What was and remains "alien," and what is "organic" or "indigenous," are very difficult questions to answer, especially in the context of the multi-ethnic, multi-cultural and multi-religious Indian sub-continent, which over several millennia has been the melting pot of many divergent religions, traditions, cultures and polities.[13] My focus on the past should also not suggest a partiality to equating "good" law with "organic" law. The German philosopher Frederick Carl Von Savigny forcefully expounded the idea that the proper laws and legal system of a people only emerge, and also ought to emerge, organically over time from the *Volksgeist* or "spirit of the people." This was in the context of his critique of the popular and

[12] See M. Weber, "Law in Economy and Society" in M. Rheinstein, (ed.), *Law in Modern History* (Cambridge, MA: Harvard University Press, 1954).

[13] This further complicates the task of identifying and giving precise shape to the structure and dynamics of pre-colonial legal orders in India – an already forbidding task due to the paucity of available archival and scholarly literature on the subject. Since the current work is not intended as a new history but an exhortation to engage with available historiography, I have not undertaken any fresh archival work to unearth, further flesh out, and add to our relatively patchy understanding of pre-colonial legal orders. I have relied instead on extant literature in order to compare and contrast certain fundamental and broad aspects of the ethos, structure, and approach of pre-colonial legal orders and the colonial system that replaced it. I do not gauge displacement by providing a precise list of what was displaced, due to the aforementioned paucity of credible information. Instead, I provide a description and analysis of what replaced it. This is much better documented, preserved, accessible, intelligible, and hence discoverable to non-historians. Implicit within this replacement is what was being displaced.

academic longing for, as well as the quality of, new European legal codes from the middle of the eighteenth century onwards.[14] As I emphasize the importance of colonial rupture of pre-colonial societies and try to understand the nature of this rupture by focusing on the "narratives of colonial displacement," this can be an understandable route to follow.

However, I shall not head down the Savignan route for several distinct reasons. And this is not merely because one is cognizant of various modern criticisms of the "Historical School" represented by Savigny. My reasons are as follows. First, as I stated in the previous section, I do not approach the question of colonial impact on Indian society with an essentialist tilt toward moral condemnation; my interest lies in finding out what changed and how. Therefore, the goal of this exercise is not an outright condemnation of colonial law as "alien" as it was against the then existing "spirit of the people." It occurs to me that the "spirit of the people" may have undergone change, as I posit earlier in this chapter. At least theoretically, one cannot rule out that colonial coercion may have evolved into something acceptable and beneficial to the people. It is also conceivable that, over time, it may also have met some of the Savignan expectations of organically implanting and settling in the local soil, even if an "alien" hand initially planted the seeds. Many post-colonial jurists and lawyers actually suggest this and I shall come to it shortly.

Second, for Savigny, law, not unlike language, was an expression of the "common consciousness of the people."[15] It was driven by "internal, silently operating powers."[16] Thus, for him German law was an expression of the common consciousness or the *Volksgeist* of the German people.[17] In view of various historical accounts that paint the picture of an India of many diverse people, it is hard to decipher a single *Volksgeist* of a single people, both prior to and during colonialism. This is also true for the eventual highly diverse and heterogeneous post-colonial societies. The tight and limiting framework of a single "nation" with a "common consciousness" never applied to the Indians in pre-colonial India, nor does it apply to post-colonial Indians, Pakistanis, and Bangladeshis.

[14] F. C. Von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. A. Hayward (London: Littlewood, 1831; repr. Union, NJ: The Lawbook Exchange, 2002).
[15] Von Savigny, *Of the Vocation of Our Age*, p. 28.
[16] Von Savigny, *Of the Vocation of Our Age*, p. 30.
[17] For a useful elaboration of Savigny's use of the term *Volksgeist*, see J. Knudson, "The Influence of the German Concepts of Volksgeist and Zeitgeist on the Thought and Jurisprudence of Oliver Wendell Holmes," *J. Transnat'l L. & Pol'y*, 11 (2002), 409–12.

Third, given the sound and fury of massive and paradigmatic state legislation by the colonial *Raj* in the latter half of its rule from the mid nineteenth century onwards, and the din of constant and wide-ranging legislation in post-colonial states, it is hard to hear the faint murmur of Savigny's "internal, silently operating powers." The role of direct and non-consensus-based legislation toward actualization of social and political engineering policies in colonial India, as well as, at times, a similar mode and manner of legislation in post-colonial states, makes legislation an unavoidable reality and focus of analysis in the present context. At the same time, one cannot lose sight of the use, misuse and abuse of laws by discordant sections or members of society, in order to indirectly shape society in ways that the legislature neither intended nor foresaw.

However, given that my point of departure in this chapter was to gauge how colonial and post-colonial laws were received, absorbed or rejected by their intended subjects, a mere scrutiny and textual interpretation of legislative and judicial output does not serve the intended purpose. In order to gauge the laws' actual impact on society, a sociological analysis of law is imperative. Extraordinary as it may seem to the conventionally minded who dominate the "legal community," it is necessary to shift the focus away from plain legal doctrine and the "legal community's" perspectives on the law to the society's perspectives on and perceptions of the law. This is necessary in order to determine how the law influences and molds society and also how society in turn influences, molds and uses the law. Further, this is also necessary in order to gauge whether a society primarily perceives the law as the means to an end, or whether the law plays a much more complex role in influencing and molding the aspirations, expectations, apprehensions, the resulting actions and reactions, and the very warp and woof of society. Whether laws are merely mechanisms for generating the rather animalistic duality of "reward" and "punishment," utilized to spur human action or abstinence in particular directions, or they denote more complex social interplays, is, therefore, a fundamentally important inquiry.

The notion of the law as essentially a social instrumentality to achieve certain ends is persuasively articulated in texts that describe human "egoism" as the basic moving force for all human progress. These texts emphatically regard society as the primary mover in this scheme of things. It is society that molds and steers human "egoism" through the instrumentality of laws, in order to achieve particular ends by bringing

about convergence in the interests of individuals and society.[18] At the same time, society adapts itself to the challenges of a changing environment by suitably changing the rules of the game by amending its laws – once again the laws serving as an essential "tool" for societal evolution, sustenance and survival. According to this Darwinian notion of societal evolution, the state, therefore, is merely a necessary and logical apex eventually reached by society. Persuasive as these narratives are in explaining law's "instrumental" role in society, one is still left wondering whether that is all that the law boils down to – a vital instrumental role? Alternatively, as I have suggested, does law have other existences and meanings in the ethos of a people and in the subconscious of a society?

One may further ask if the law ought to be the sole object of concerted attention while looking at social continuity or change. Important writings on the sociology of law alert one against ascribing too much importance to the laws, and to perceiving the state as the sole source of the rules that actually govern society. Instead, they highlight "social associations," and the important role at every turn of morality, religion, ethical custom, decorum, tact, etiquette, fashion, etc. in governing human conduct, and even the so-called legal sphere. According to this perspective, it is these normative frameworks of an organic and interrelated society which predate legal norms and that germinate legal rules.[19] Thus, laws ultimately emerge from the life of society; it is the "life of society" which, therefore, ought to be the focal point of attention. An important additional insight by some of the leading proponents of "American Legal Realism" is that the essential focus of the law itself should really be on the actual disputes in a society – for it is the "doing of something about disputes," and the "doing of it reasonably," which is the business of law. This in turn makes the doings of those in charge of this business of the law – i.e. the officials – the law itself.[20] This further shifting of focus from law as "a set of rules of conduct" to a behavioral analysis of its practitioners, stakeholders and affectees, from the "law in books" to the "law in practice," and from "paper rules" to the "real rules," has added resonance for colonial societies. It is in such societies in particular, where due to the

[18] R. Von Jhering, *Law as a Means to an End*, trans. I. Husik (New York: Macmillan Co., 1924). Morality is also acknowledged as an additional motivator by the author, although it is placed on a lower pedestal.

[19] E. Ehrlich, *Fundamental Principles of Sociology of Law* (Cambridge, MA: Harvard University Press, 1936).

[20] K. N. Llewellyn, *The Bramble Bush: The Classic Lectures on the Law and the Law School* (New York: Oxford University Press, 2008).

inherently dichotomous relationship between the enforced ruler and the forcibly ruled, that one can visualize the possibility of large gaps between the intent, letter, application and actual effects of laws.

The "behavioral analysis of law" approach extols the merits of looking at the "sociology of the transactional process," i.e. the extent of the relevance of rules in the actual scheme of things and what actually transpires in legal transactions. It highlights the "sociology of operation of the legal process as a way of coercing people" – in other words, the actual consequences of judgments, trials, settlements, etc. It draws attention to the "sociology of legal decisions," i.e. the ambiguity, the gaps and the why and how of actual judicial decisions. It also lays emphasis on the differential impact of the application of laws on diverse groups.[21] The complex interplays of the law with society thus necessitate looking behind laws and rules in order to see what actually happens in and to a given society, under its laws. To the people in a society, what ultimately matters may simply be who wins under a legal system and who loses. So one could argue that for colonized societies (not unlike any other society), any set of laws, shed of its historical baggage and the ongoing ire of anti-colonial patriotism, could theoretically work as long as it upheld and promoted what vast sections of that society wanted it to uphold and promote. The "narratives of colonial displacement" provide interesting insights into whether that actually happened in colonial India. These narratives lay claim to possessing such insights as they do not just examine colonial laws on their face value, but attempt to unravel their deeper and complicated linkages with and impacts on colonial society.

The "narratives of colonial displacement": three basic strands

There is growing multidisciplinary literature that focuses on the multifaceted impact of colonial laws and legal system on Indian society. Embedded in this literature is a rich array of what I term the "narratives of colonial displacement." Varying as they are in their description and normative positions, their points of emphasis and the ambit of their coverage, these narratives are also similar at one level – all of them present a complex picture of a colonized society in turmoil and transition. Major acts of colonial legislation act in these narratives as helpful signposts. They identify important episodes of the whittling

[21] K. N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (New Brunswick: Transaction Publishers, 2008).

down or transformation of old orders. However, for a deeper appreciation of how colonial laws impacted Indian society, and how society received and reacted to these impacts, it is necessary to decipher the subtle social undercurrents leading to long-term social and structural change. This in turn can provide nuanced understanding of whether the initial incongruence of colonial laws, and indeed the indigenous societal aspirations with these laws, was transient, or whether it persists, and if so, then why so.

The literature on the "transformation" or alleged "transformation" of the Indian legal system under colonialism is fascinating both for the diversity of disciplinary perspectives that it brings to the debate and for the divergence of its verdict on the quality, impact and outcomes of this transformation. That significant changes did take place – more gradually from the late eighteenth century to the middle of the nineteenth century, and much more rapidly in the second half of the nineteenth century with the grand introduction of several Indian legal codes – is hard to deny. Exciting recent scholarship shows how drastically the colonial codification of Hindu civil and personal law in the late eighteenth century changed formal legal understanding and application of Hindu law in the Bengal Presidency.[22] Similarly, although the British initially embraced and applied Muslim criminal law as the criminal law of Bengal in the late eighteenth century, it is argued that they set about to systematically change it. According to one study, by 1817 this incremental process had reached a stage where the transformation was essentially complete. As a result, while Islamic law was still in theory the applicable law of the land, in practice, a series of significant substantive and procedural amendments ensured that on some of its most important points, it was a transformed British version of the earlier Islamic law. According to this view, although the facade was nominally kept until 1864, Islamic law had lost its real influence by 1817. This was essentially due to unprecedented and systematic constitutional legislation by the British.[23]

An equally important factor, it is alternatively argued, was the collapse of the Mughal administration of justice and the colonial "search for effective and inexpensive modalities of rule," as they "encountered a

[22] N. Bhattacharyya-Panda, *Appropriation and Invention of Tradition: The East India Company and Hindu Law in Early Colonial Bengal* (New Delhi: Oxford University Press, 2008).

[23] J. Fisch, *Cheap Lives and Dear Limbs: The British Transformation of the Bengal Criminal Law 1769–1817* (Wiesbaden: Franz Steiner Verlag, 1983).

variety of legal norms and institutions that varied according to the determinants of locality and community life."[24] Post 1857, British legislation became much more direct and all encompassing, but we shall come to that soon. Whether the related social transformation was forced or whether certain emerging classes of Indian society actively welcomed, collaborated to bring about and gained from this transformation, fits in the broader aforementioned "change/continuity" debate in Indian historiography. Whether the transformed Indian legal system was a resounding success when launched – living up to its ideals of "justice, equity and good conscience," which only stuttered and faltered in a post-colonial context – or cracks started to appear fairly early on, is the other interesting facet to this debate.

In my view, the "narratives of colonial displacement" reveal three broad perspectives on the impact of the colonial legal system on the colonized society. A typical and fundamentally contested position – which divides, for example, those looking at the impact of colonial laws on the traditional Indian village society and its problematic post-colonial reverberations manifesting in popular dissatisfaction with the colonial judicial system and processes – is as follows. Is it the character of the Indian peasant society and the comprehensive clash of the values and structure of Indian society with the legal system introduced by the colonists that resulted and still results in a fundamentally flawed judicial process – a priori attitudes to British justice as a discrete system of rules and procedures?[25] Alternatively, is this conflict endemic to all societies and will the way of acting out conflict vary with the society? In other words, according to the latter view, the central problem to account for is the variance between the social structure of the judicial system (and not its incongruity with traditional values) and the character of the practical dimensions of the judicial process – essentially internal developments within a due process system inherently susceptible to distortion by its participants.[26] Another perspective on the same question focuses on a

[24] M. R. Anderson, "Islamic Law and the Colonial Encounter in British India" in D. Arnold and P. Robb (eds.), *Institutions and Ideologies: A SOAS South Asia Reader* (Richmond, Surrey: Curzon Press, 1993), p. 184. See also J. E. Wilson, *The Domination of Strangers: Modern Governance in Eastern India, 1780–1835* (Basingstoke: Palgrave Macmillan, 2008).

[25] B. S. Cohn, "From Indian Status to British Contract," *The Journal of Economic History*, 21(4) (1961), 613–28.

[26] R. L. Kidder, "Courts and Conflict in an Indian City: A Study in Legal Impact," *Journal of Commonwealth Political Studies*, 11(2) (1973), 121–39.

third and local variable as a necessary causal and explanatory factor. It holds that it is actually the structure of the Indian village society that has pushed the court system into its peculiar mold. This perspective highlights "land" and the significance of the character of land relations, disputes and their impact in both inhibiting the Western-style courts from effectively settling land disputes (evidence suggests that historically these courts have been overwhelmingly concerned with land disputes) and also shaping the judicial administration itself.[27] In other words, the fate of the courts, according to this view, was bound up with the land structure of India under British rule. Hence, a turbulent agrarian structure was reflected in an immensely problematical judicial system. Thus, the courts were not just settling land and agrarian disputes, but were also part of a larger administrative whole that was preoccupied with the economic consequences of policy framed by other organs of the government. As a result, the courts were employed for the overwhelming tasks of enforcing new definitions and allocations of rights and duties concerning land, as well as enforcing taxation claims of the state.[28]

One can immediately detect certain binary opposites emerging in these approaches, in terms of both the diagnosis of the problem of dysfunctional post-colonial legal systems and possible prescriptions. In the first of the three approaches briefly described above, there is a Savigny-like recognition of something "organic" about the traditional Indian village society that was majorly impacted in a transformative clash with something from outside – something "alien" and not "organic." Normatively speaking, adherents of this viewpoint also, but not always, perceive the colonial intervention as violent and complete – so that the colonial agenda eradicated the earlier "organic holism" with highly problematic after-effects, such as a dysfunctional judicial system. This to them is inevitable given that colonial law, adapted as it was to the needs of Western society and governance imperatives, was not at all cognizant of the needs of Indian society. The second approach mentioned above, on the other hand, is much more reminiscent of the "evolutionary" description of society and legal systems provided by Rudolf Von Jhering. Conflict is deemed as part and parcel of growth, progress and eventual reconciliation, as human "egoism" finds novel ways to use law to meet the newly negotiated ends of society. According to this perspective, if

[27] O. Mendelsohn, "The Pathology of the Indian Legal System," *Modern Asian Studies*, 15(4) (1981), 823–63, 826.

[28] Mendelsohn, "The Pathology of the Indian Legal System," 859.

during this process the participants in the judicial system distort its functioning, that is not unusual. It happens everywhere and the system, through appropriate adjustments, can be tweaked for better performance. Displacement of a tradition and uprooting of what was "organic" has nothing to do with it. This is because society, in any event, remains in a constant state of change and adjustment. The third approach, by emphasizing land, the structure of Indian village society and traditional land relations contains something of both Savigny and Von Jhering. While it does not adopt a position that attaches a certain normative primacy to what is "organic" – in this case land, village structure and traditional land relations – it highlights their practical and causal primacy in the molding of the colonial as well as contemporary Indian judicial system. Concurrently, it emphasizes, Von Jhering-like, the multi-pronged use of laws and courts to meet multiple governmental policy ends, which invariably influence their adjudication of land disputes.

It is noteworthy that all of the aforementioned accounts – coming from an anthropologist, a sociologist and a legal historian respectively – are seeking to diagnose the ills of independent India's post-colonial judicial system by attempting to understand its past. It is also an interesting example of how differences in normative and descriptive stances on the impact of colonial law on Indian society can lead to very different remedial prescriptions. If we believe that history has a role to play in forming and shaping the present, any meaningful evaluation of how post-colonial legal systems function, or indeed malfunction or not function at all, would be necessarily affected by the fundamental premise with which we approach the colonial transformation. This, therefore, necessitates some additional elaboration of the basic positional differences of the "narratives of colonial displacement." I would define them as follows:

(i) the colonial legal system as a displacer of indigenous laws and dispute resolution systems that were local, intelligible, accessible and essentially in harmony with indigenous social, political, economic and cultural understandings and aspirations (the "radical displacement argument");
(ii) the colonial legal system as an inevitable modernizing trend that created a hybrid that had its fair share of problems, but that spread, evolved, was embraced and eventually embedded itself in the eventual post-colonial societies, much the same as legal systems grow and evolve elsewhere (the "inevitable modernization argument"); and

(iii) the colonial legal system as a necessary modernizing trend that displaced what was paternalistic, discretionary, discriminatory and corrupt (the "desirable modernization argument").

Among these three strands, the "radical displacement argument," which is also the most anti-colonial in its emotive nature, is in many ways of greatest contemporary interest. This is because, much more so than the other strands, it not only advocates historical and sociological understanding of the colonial impact on Indian laws, but also exhorts the recognition of the continuing relevance of this "impact" on the state of law and society in post-colonial contexts. The points of departure for the "inevitable modernization argument" and the "desirable modernization argument," on the other hand, are that post-colonial societies have already made important historical and sociological transitions from which points of return are essentially non-existent, and even undesirable. When the spokespersons for these perspectives are persuaded to look at the colonial past, they embrace the notion, with various levels of emphasis, that colonial policy essentially pushed forward/promoted trends that had already existed in the pre-colonial evolutionary stage of Indian society. In other words, British policy choices were not very different from those of their predecessors, the Mughals. As to the modus of change, while violence and coercion may have at times played a role in pursuit of certain policy objectives, so did compromise, cooperation and acceptance.

Two representative examples of the "inevitable modernization argument" are as follows. This argument is well captured in the lectures of an illustrious Indian Attorney-General on the theme of the reception of English law in India – a reception that took place through the famous codes of the second half of the nineteenth century, the decisions of the Privy Council, the application of the principles of "justice, equity and good conscience" by Indian courts and the continuing loyalty of Indian courts to this body of jurisprudence.[29] According to this view, modern Indian law is: "[N]otwithstanding its foreign roots and origin … unmistakably Indian in its outlook and operation," so that there is little sentiment within or outside the profession for the revival of "indigenous law."[30]

[29] M. C. Setelvad and P. Vibhufan, *The Common Law of India, Attorney-General of India* (London: Stevens & Sons Ltd, 1960).

[30] Setelvad and Vibhufan, *Common Law of India*. We are not quite told what this "indigenous law" is. However, the very assertion that there is no contemporary support for its revival distinguishes it as something quite different from what replaced it. The additional

Fifteen years after independence, a chief justice of the Calcutta High Court wrote:

> We owe to the British a deep debt of gratitude for the introduction of the Law-Courts and a system of dispensing justice based on the English pattern. Although our laws are molded to our needs, they are inspired by the British system of jurisprudence, which fortunately happens to be one of the best systems that the world has ever produced.[31]

The above assertion necessitates an important caveat. Despite inspirations and similarities, the extent to which English law was directly imported from Britain to India is highly debatable. This is in view of the fact that in many ways India was a guinea pig for legislation that was introduced much later in Britain. Furthermore, there were other important differences between British law and the law introduced by the British in India.[32] Notwithstanding this point, the aforementioned examples of the "inevitable modernization argument" embrace the tradition of British law in colonial India and rejoice in its further entrenchment, development and growth in post-colonial India. In fact, it is hard to overlook an element of the "desirable modernization argument" position in this uninhibited rejoicing. To the exponents of this or similar positions, development of greater understanding of the pre-colonial genealogy and genesis of the laws and legal systems of post-colonial societies may

assertion that the law of foreign origin that has replaced "indigenous law" is "unmistakably Indian in its outlook and operation" raises the further question of whether what it replaced lacked or had lost these attributes, considering that it was after all "indigenous law." As stated earlier in this chapter, I am not setting out to define and illustrate the precise contours of this "indigenous law" (which was in itself an evolving concept and varied across the vast territory and complex diversity of India). Instead, I am endeavoring to distil its essential ethos and approach from a close examination of what I have called the "narratives of colonial displacement."

[31] D. N. Sinha, "The Last Hundred Years," in *The High Court Centenary Souvenir*, pp. 6–27. Cited from P. Chatterjee, *A Princely Imposter? The Strange and Universal History of the Kumar of Bhawal* (Princeton University Press, 2002), p. 377. It is to be noted that unlike the previous quote, this quote does not attempt to Indianize the British system of jurisprudence introduced in India, by ascribing to it an Indian outlook and mode of cooperation. The "pattern" is English, the "inspiration" is British, and there is mention of the added good fortune that the system introduced by the British "happens to be one of the best systems that the world ever produced."

[32] See, e.g. a comparison of the criminal legal system eventually introduced by the British in India with the criminal law *en vogue* in England at that time in both: Fisch, *Cheap Lives and Dear Limbs*; and Stokes, *English Utilitarians and India*.

be of marginal intellectual curiosity and interest.[33] It is certainly of negligible relevance to them for contemporary legal analysis or law reform.

The texts, especially those from the colonial era, that advocate the "desirable modernization argument," on the other hand, make no overt attempts to veil an underlying bigotry and racial superiority. Not surprisingly, they mostly appear in colonial tracts justifying various legislative interventions. Take, for instance, a typical justification for modifying Indian law coming from a colonial administrator of the late nineteenth century, who comments on the existing Islamic law as follows: "… there were portions of the Mahommedan law which no civilized government could administer,"[34] and "… native law often embodied rules repugnant to the traditions and morality of the ruling race. An English Magistrate could not enforce, an English Government could not recognize, the unregenerate criminal law of Indian Mahommedanism."[35] There was, at times, open acknowledgement that English magistrates and judges had been guilty of relying on imperfect remembrances of the principles of English law during their application under the name of "justice, equity and good conscience," in order to address defects in local laws.[36] This, however, was often deemed as forgivable, given the larger complex

[33] However, it is also important to take cognizance of certain important works that highlight some of the colonial imperatives for centralization, simplification, and consolidation of a modern system of administration of justice in the context of the political situation in late Mughal India. These "modernization" positions do not necessarily endorse the ethos of colonial "modernization," but they do make important and plausible arguments for some of the practical needs of the time for modernization. See, for instance, R. Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998); and also Wilson, *The Domination of Strangers*, which explores the origins of what it describes as "modern" ideas about the Indian state and civil society and links them to the interaction and interface between the British rulers and their Indian subjects. Wilson's primary and most interesting argument is the one that attempts to explain why and how the colonial administration in India (more particularly in colonial Bengal from the 1780s onwards), like many other emerging regimes of the nineteenth century elsewhere on the globe, felt the need to start treating its subjects as "strangers," employing "modern" techniques of objective governance (abstract rules and codes of law, categorizations, enumeration, statistics, etc.). This was done in order to replace the earlier preferred mode of face-to-face governance that was based on "prior familiarity" between the ruler and the ruled. This is an argument that will be further explored in this chapter in the context of other writers as well.

[34] C. Ilbert, "Application of European Law to Natives of India," *Journal of the Society of Comparative Legislation*, 1 (1896–7), 212–26, 213.

[35] Ilbert, "Application of European Law," 224.

[36] Ilbert, "Application of European Law," 224.

administrative challenges being faced by colonial administrators. Proceeding with unflinching faith in the superiority of the colonial legal system and reporting its increasingly welcome reception by the natives, the emphasis of those formally entrusted with evaluating its successful assimilation in the local soil was primarily on the need to constantly scrutinize the performance of the native operators of the system. Writing in the mid-nineteenth century, one such evaluator reports: "The European judges, in fact, exercise little more than appellate jurisdiction, combined, however, with the indispensible and highly important duties of watching over the conduct and proceedings of the native judges – a supervision which can never be abandoned or even relaxed with safety."[37] While I will later elaborate some more on these arguments, the bulk of the following analysis will focus on the "radical displacement argument," in order to gauge its various facets, complexity and level of persuasiveness.

Colonial rule in India: early anxieties and dilemmas and the search for "ancient constitutions"

Before elaborating further on the "radical displacement argument," it would be beneficial to briefly examine interesting new historical insights into the inherent dilemma faced by the British, while attempting to find both a justification and a legal edifice for their rule in late-nineteenth-century Bengal – the bridgehead to the eventual empire. This is also important in order to better appreciate the ideological impetus of the empire and to avoid perceiving it as ad hoc expansionism. In a fascinating recent book, Robert Travers argues that "British views of the state in India were shaped by political presuppositions exported from British politics, as well as by the distinctive will to power of foreign rulers" – though he concedes that these British presuppositions were also rethought in the British encounter with the local political culture.[38] Thus, British imperial ideology and early colonial institutions were "formed at the intersection of exported European concepts and appropriated indigenous categories that were put to new uses by the colonial state."

[37] Colonel Sykes, "Administration of Civil Justice in British India, for a Period of Four Years, Chiefly from 1845 to 1848, Both Inclusive," *Journal of the Statistical Society of London*, 16(2) (1853), 103, 136.

[38] R. Travers, *Ideology and Empire in Eighteenth Century India: The British in Bengal* (New York: Cambridge University Press, 2007), p. 250.

Importantly, this was done "as much by translating indigenous voices into the new logic of colonial archive, as by excluding those voices."[39] Travers's central thesis revolves around how "British strategies of colonial state building in Bengal often involved excavating the constitutional history of India to find workable models for their own government."[40] He explains that drawing on the notion of the "ancient constitution," which he describes as "a hallmark of early modern political thought in Britain," the "language of ancient constitutionalism was transplanted to Bengal, where the British tried to justify their rule by reference to an ancient Mughal constitution."[41] The idea of ancient constitutionalism in this context was that in order for any given sovereignty not to degenerate into licence and arbitrary power, a robust idea of rights and laws enshrined in a constitution was a necessity. Travers describes extensive debates in late-eighteenth-century Britain between Whigs and Radicals as to whether the British state still adhered to or had lost sight of its commitment to the idea of the "ancient constitution." These debates took place against the backdrop of growing criticism in the metropolis of the East India Company's arbitrary and rapacious governance of Bengal, raising apprehensions of tainted perceptions of British values and law.[42]

Alongside the idea of the "ancient constitution," there persisted the British admiration of Montesquieu's theories about the typology of different polities and constitutions, and his popularization of the notion of despotism as a ubiquitous, characteristic and even justifiable Asian phenomenon.[43] Thus, the debate revolved around the question of whether the East India Company's rule in Bengal was an abrogation of some ancient constitution, or (as claimed by Governor-General Warren Hastings) an attempt to resuscitate some semblance of an "Indian" ancient constitution, as it was supposed to have flourished under the great Mughals. A key interlocutor in these debates and Warren Hastings's nemesis before and during his infamous trial – the philosopher Edmund Burke – was a primary champion of the view that Indians had remained a civilized and cultivated people for ages and possessed an

[39] Travers, *Ideology and Empire*, p. 14.
[40] Travers, *Ideology and Empire*, p. 8.
[41] Travers, *Ideology and Empire*, p. 8.
[42] Travers, *Ideology and Empire*, pp. 43–66.
[43] C. de Secondat Baron de Montesquieu, *The Spirit of Laws* (1748; repr. Amherst, New York: Prometheus Books, 2002). Montesquieu held that "despotism" had its own rationale and justification of existence in certain geographical, sociological, and cultural circumstances. For a discussion of these ideas, see Travers, *Ideology and Empire*, pp. 48–9.

ancient constitution, which the British were bound to preserve.[44] Warren Hastings's main ideological opponent, Phillip Francis (Member of the Supreme Council of Bengal, 1774 to 1780), also appeared to share with him a commonality in his commitment to reviving some notion of the "ancient constitution."[45]

What was thus on offer for choosing was "Hastings' absolutist interpretation of Mughal sovereignty, tempered by ancient legal traditions," and "Francis' assertion of an ancient constitution of property."[46] Eventually, it was the Cornwallis Code, with certain borrowings from the aforementioned discourse on ancient constitutions, the manner of administration of Muslim and Hindu law in Company courts and pre-existing forms of land tenure that "marked a discursive break" from this rhetoric of ancient constitutions in British India.[47] The decline of the Company and the strengthening of the state in the period after 1784 ushered in a more unified national imperialism in India and led to the erosion of the idea of a Mughal constitution as the possible basis for British rule.[48] Thus, while being a necessary instrumentality in the early years of the empire, the empire's changing imperatives necessitated that the search for the "ancient constitution" was suspended when it started to become a handicap.

One should add that some recent histories are critical of differentiating between the different phases of the Company's administrative policies and certain key figures, according to whether they followed an "Orientalist" policy of looking to and relying upon indigenous political, legal and social traditions, or adopted new principles of rule in a much more assertive "Anglicist" mode. According to Radhika Singha, for instance,

[44] E. Burke, "Speech on Fox's India Bill" in E. Burke, *On Empire, Liberty and Reform. Speeches and Letters*, ed. D. Bromwich (New Haven, CT: Yale University Press, 2000).

[45] See Travers, *Ideology and Empire*, pp. 138–40, 166, 177–80. This was despite their various major differences. Such as, for instance, whereas for Cornwallis the restoration of the "ancient constitution" lay in his centralizing initiatives for executive empowerment in administration of revenue and justice (which was reminiscent of his view of the Mughal state), for Francis, the "*zamindars*" (the landholding rural elite) with their claim to "ancient rights" were the real pillars of this system. Thus, to him the model of a "country government" was the way forward (Travers, *Ideology and Empire*).

[46] Travers, *Ideology and* Empire, p. 207.

[47] Travers, *Ideology and* Empire, p. 251.

[48] Travers, *Ideology and* Empire, p. 25. See also Wilson, *The Domination of Strangers*. For an interesting further evaluation and discussion of Robert Travers's thesis, see the very thoughtful review of his book by Jon Wilson at J. E. Wilson, "Review of *Ideology and Empire in Eighteenth-Century India: the British in Bengal*" (review no. 697), www.history.ac.uk/reviews/review/697.

there was little difference between Hastings the "Orientalist" and Cornwallis the "Anglicist" in terms of extending the legal and punitive claims of the state – the sole theme for debate was the actual strategy to be used. In other words, the debate was whether the government should transact with traditional symbols of power, constantly trying to reinterpret them in ways that were more appropriate to the new premises of sovereign right, or whether the Company should press forward, introduce and establish its own symbols of legitimacy, and thus actively encourage a different sort of public opinion around them.[49] Notwithstanding this critique, Robert Travers's work extends persuasive evidence that the early period of Colonial rule in Bengal displays an era of unprecedented and fascinating soul-searching, as well as a highly inventive and internally divisive search for an overarching principle and justification for colonial intervention and governance. This, however, did not survive the turn of the century. One could even glibly say that, by the turn of the century, the British had "found" the reasons for their presence in India. In any event, this soul-searching phase eventually passed so that, in the post-Cornwallis era, "the 'bureaucratic-military despotism' of the colonial state preferred to make its own rules."[50] This move has been described as "ethnocentric" and "Saxonist,"[51] and one that led to "racial segregation and the rule of force."[52]

There are several reasons for this foray into describing "the ancient constitutions" debate in the early anxious and uncertain period of colonial expansion in India – at a time when the Crown was attempting to wrest the controlling initiative from the Company. First, this early period of the colonial legal history of India seems to display a fundamental lack of clarity of justification for ruling over a large, complex and advanced civilization. It also divulges colonial uncertainty as to the most suitable form of government for India. This puts to question any notions that the Crown had stepped on Indian shores with a readily assembled ethos and design for the eventual empire. Furthermore, it comes across that the Crown and the Company were highly cognizant of the tremendous "displacement" they were actually causing. They were also sensitive to its myriad ramifications – both in terms of the sustainability of their fragile rule in India and the possibility of adverse political reaction back in England. What also comes through is that with the search for the "ancient constitutions" being a major early colonial preoccupation and a

[49] See Singha, *Despotism of Law*. [50] See Travers, *Ideology and Empire*, pp. 25–6.
[51] Travers, *Ideology and Empire*, p. 26. [52] Travers, *Ideology and Empire*, p. 30.

ubiquitous characteristic of its initial governance strategy, this era is distinct from the subsequent self-assured colonial enterprise of professedly bringing a new and better legal and judicial system to the Indians.

In many ways, the quest for the "ancient constitutions" was motivated, propelled and characterized by agendas of co-option and reinvention of Mughal government, for purposes of local acceptability, for allaying domestic criticism in England and for justifying strong, centralized executive power. Selective use of "traditional" sources helped to justify the regime and facilitated the reading of aspects of English Whiggism into the revived "ancient constitution." This was imported Whiggism with a penchant for a property regime and possibilities of land alienation. It further paved the way for more effective, extractive revenue policies. Identification and co-option of local allies as pillars of colonial governance and creation of new forms of social and political hierarchy were as much the impetus for these debates as strident quibbling during this period over power and control between the Company and the various state representative institutions.[53]

The final reason for my focus on this period and its debates is embedded in Travers's conclusion to his book. He says:

> While the British project of reviving the ancient Mughal constitution proved to be short-lived, nostalgia for the lost empire of the Mughals remained an important element of Indian patriotism into the nineteenth century and beyond; and Indian scholars and politicians would continue to return to the pre-colonial past as a resource for a hoped-for post-colonial future.[54]

Before I revert to a detailed exploration of the "radical displacement argument," I will first describe a specific strand of the "narratives of

[53] See, generally, Travers, *Ideology and Empire*. An additional reason why this early period merits discussion in the context of this chapter is the significant early struggles between the Company government and the new Royal Court of Justice in Calcutta. The latter claimed to have exposed what it thought was the Company's "rhetoric of regulated government, and the loosely coordinated network of power holders sheltering under the Company's sovereignty" (Travers, *Ideology and Empire*, p. 181). Faced with possible judicial accountability of its officers and their Indian allies in their official work, the clash had varied outcomes for the Company and, indeed, also for the indigenous legal system and its law officers. For instance, one important outcome was the court's vilification of Muslim court officers (working under the patronage and supervision of the Company) as oppressive. This displayed the chauvinistic outlook of the English court, as well as "the emerging colonial attitude towards legality in India," which showed no aptitude for being "willing or able to think through the intellectual and institutional workings of the Muslim law" (Travers, *Ideology and Empire*, pp. 204, 206).

[54] Travers, *Ideology and Empire*, p. 253.

colonial displacement." This strand critically looks at this early phase of colonial rule and the attempts made therein to "translate" and "codify" ancient Hindu as well as traditional Islamic texts. It argues that these enterprises were undertaken with a view to deriving principles consistent with a so-called "modern" ethos, in order to create a workable and locally acceptable hybrid for colonial governance.

Lost or hidden in translation

The "radical displacement argument" strand of the "narratives of colonial displacement" emphasizes, to my mind, pure colonial prejudice, an inherent misfit of cultural and legal traditions and a vital contradiction between economic and political self-preservation policies of the colonial government and the colonial "rule of law" rhetoric. One particular category of this strand stresses that the early colonial legal and social engineering attempts were also structurally and systemically defective, misconceived and incompetent. They were also characterized, this strand alleges, by deliberate mistranslation. As a result, according to these narratives, much was lost and hidden in translation. Of particular significance in this context, according to these narratives, is a more nuanced understanding of the decline and fall of Muslim culture in India. As the heritage of the vanquished rulers of the land, Muslim heritage, they argue, was especially misunderstood, misinterpreted and transformed into something unrecognizable. Scholars like Scott Alan Kugle, for instance, argue that it was impossible for the British to approach Islamic law on its own terms, due to their ignorance of *fiqh*.[55] Further, being in direct competition with Mughal legitimacy of rule, they were, according to him, compelled to condemn Mughal jurisprudence in order to justify their own seizure of power.[56]

An "anti-legal tradition" mindset, it is argued, also contributed to this, as the British administrators who reshaped Islamic law also wanted to reorder English law. Their mindset was utilitarian, rationalist and progressive – hence a tone of superiority was extended toward any legal "tradition," be it Islamic or English.[57] Focusing on the "translation" phenomenon, Kugle unravels colonial attempts at rejection and

[55] S. A. Kugle, "Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia," *Modern Asian Studies*, 35(2) (2001), 257–313, 283.
[56] Kugle, "Framed, Blamed and Renamed," 283.
[57] Kugle, "Framed, Blamed and Renamed," 283.

appropriation through what he shows to be highly flawed processes of translation and codification.[58] He suggests that this codification was based on two essential misconceptions: the first being that Islamic law was completely codified in the past, and so it was locatable in a single authoritative text that could be readily implemented. The second misconception was that the British could produce this code in one comprehensive text that would apply to Muslims as a single, discrete community.[59] Significantly, according to Kugle, what was lost sight of was that Islamic law – as the "law of the jurists" – is "an eclectic body of rulings."[60] Its approach, according to Kugle, is to actually respond to its immediate social context, through several and non-jurisdiction-bound judicial authorities with multiple and overlapping responsibilities.[61] Thus, its rationality was substantive rather than formal.[62] When this substantively rational legal system was transposed, according to Kugle, into a formally rational, centralized, structured and hierarchical one – through, for example, the introduction of the doctrine of *stare decisis* into a tradition free from binding precedent[63] – there was tremendous slippage: much of the creativity, flexibility, dynamism and substance of traditional Islamic law were lost.[64] This critical strand of the "narratives of colonial displacement" is not just restricted to the theme of the "transformation" of Islamic law in India. Bhattacharya-Panda tells a similarly compelling story about the codification of the Hindu *dharmsastras*.[65]

Another important facet of this strand of the "narratives of colonial displacement" focuses on how "foreign" law was imported into colonized societies. So, for instance, it argues that the so-called gaps in the laws of

[58] Kugle, "Framed, Blamed and Renamed," 257–313.
[59] Kugle, "Framed, Blamed and Renamed," 270, 272.
[60] Kugle, "Framed, Blamed and Renamed," 274.
[61] Kugle, "Framed, Blamed and Renamed," 274, 284, 290, 295.
[62] Kugle, "Framed, Blamed and Renamed," 270.
[63] It has to be noted though that this clean-cut dichotomy is not completely accurate and is itself tainted with orientalist compartmentalization.
[64] Kugle, "Framed, Blamed and Renamed," 274, 284, 303.
[65] See Bhattacharyya-Panda, *East India Company and Hindu Law*. On a related note, some historians have also argued that the Hindu legal thought subsumed and continues to subsume the same jurisprudential development, schools of jurisprudence, and theories of law as in traditional Western systems. They lament, however, that there seems to be no getting away from categorizing the East and West as opposites in American academic writing. See H. A. Freeman, "An Introduction to Hindu Jurisprudence," *American Journal of Comparative Law*, 8(1) (1959), 29–43, 29–30.

India were filled by English judges through the amorphous doctrine of "justice, equity and good conscience," which can be critiqued as a convenient modus for direct importation of English law. As mentioned previously, certain colonial administrative accounts contain a candid acknowledgement that English magistrates and judges had been guilty of relying on imperfect remembrances of principles of English law and their application under the name of "justice, equity and good conscience," while addressing "defects" in local laws.[66] Thus, the British Codes and British Anglo-Muhammadan courts, it is alleged, carried out a transformation of Islamic law governing the private transactions of Muslims and their religious usages, erasing at the same time the last traces of Islamic law from the areas of criminal law, evidence law and public law.[67] As Kugle states: "The effects of British rewriting have created a lens of texts, terms and experiences which continue to distort the view of shari'ah today."[68]

Quite apart from Hindu and Muslim personal law, local customary law is another area that, at different stages of colonial rule, seemed to encounter deliberate colonial amnesia and neglect or, in other instances, zealous attempts at translation, condensation, restructuring, interpretation and reinterpretation. One of the most remarkable and perhaps even unanticipated results of the British administration of indigenous law is described as "the elevation of the textual law over fewer bodies of customary law."[69] It is argued that this attitude stemmed from a

[66] See Ilbert, "Application of European Law to India," 224.

[67] See Kugle, "Framed, Blamed and Renamed," 300–1.

[68] Kugle, "Framed, Blamed and Renamed," 304. It is important, however, to ensure that one does not over read this argument, and hence it merits further probing whether the Muslims, for instance, played a prominent subsequent role in the political contestations around and the eventual definition and development of what came to be called Anglo-Muhammadan law. Recent works such as G. C. Kozlowsky, *Muslim Endowments and Society in British India* (Cambridge University Press, 2008), which look at this aspect in the context of their narrower focus of inquiry into the *Waqfs* or the Muslim concept of endowment, as well as classics on Indian Muslim Personal Law such as S. Ameer Ali, *The Personal Law of the Mahommedans* (London: W. H. Allen & Co., 1880); and *Mohammedan Law* (Calcutta: Thacker, Spink & Co., 1892), Vols. 1 and 2 highlight such a role in the late nineteenth century onwards. It is a separate project, however, to gauge the nature, quality, and impact of Muslim contributions to the development of Anglo-Muhammadan law, which is beyond the ambit of this work. The purpose of highlighting works like that of Kugle here is to essentially bring to attention a particular strand of the "narratives of colonial displacement."

[69] M. Galanter, "The Displacement of Traditional Law in Modern India," *Journal of Social Issues*, 24(4) (1968), 65–91, 73.

common-law hostility to unwritten and hence difficult-to-prove local customs and an over-reliance on primary texts, which in actuality were "subject to variable interpretation and quasi-legislative innovation at the discretion of village notables or elders."[70] The quest for accessibility, clarity, certainty and finality resulted in the demise of dynamism, discretion and flexibility – the ideals of traditional law.[71] It seems that although it attempted to do so, the colonial mind did not quite figure out how to understand and tackle a plethora of customary laws and practices of different communities, as well as local, tribal, caste and family usages. The complexity of the challenge comes through even in the early administrative texts that are otherwise suffused with colonial self-assurance and pride.[72] The enormous scale of the task was deemed a hurdle even during periods of colonial recognition of "the great importance of custom and usage in modifying, and in some cases in wholly superseding, the established rules of Hindu and Mohammedan jurisprudence."[73]

An additional bias seemed to emerge from what were found to be very different indigenous understandings of and expectations from "custom" and "usage," as compared to the sense in which those terms were employed in English law.[74] Not appreciating the nature and complexity of the rights and obligations promoted and protected by customary law in societies that put a premium on community and collectivity, customary law was found to be vague, confusing and the cause of "deplorable" uncertainty regarding British notions of "individual" rights.[75] Denial of customary law to entire communities, emanating from these misunderstandings and biases, could and did result in wide-scale displacement. This, for instance, was the case when Muslims were denied access to customary law alongside access to Muslim personal law, ostensibly under the notion that custom had a much less significant role to play in Islamic law as opposed to Hindu law – and this happened in spite of criticisms from various Muslim communities.[76]

[70] Galanter, "Displacement of Traditional Law," 73–4.
[71] Galanter, "Displacement of Traditional Law," 73–6.
[72] See Ilbert, "Application of European Law to India," 212–26.
[73] L. J. Robertson, "The Judicial Recognition of Custom in India," *Journal of Comparative Legislation and International Law*, 3rd Ser., 4(4) (1922), 218–28, 218, 222.
[74] Robertson, "Judicial Recognition of Custom in India," 226.
[75] Robertson, "The Judicial Recognition of Custom in India," 227.
[76] G. Rankin, "Custom and the Muslim Law in British India," *Transactions of the Grotius Society*, 25 (1939), 89–118.

Statutory protection, if and when extended to customary law, was also disparate and fragmented. Conflict of judicial opinion was especially pronounced in various areas of Muslim law in general, and also with regard to the customary law in the Punjab, especially in the rural areas, where the written-down Hindu and Muslim laws had not obtained the same authority as elsewhere.[77] Even where the British focused on custom, as in the Punjab, their initiatives did not bring colonial notions of customary law any closer to actual "tradition," as they did not preserve the practices of the community in an uncontaminated form. It is argued that in places like the Punjab a certain romantic reverence of tradition on part of colonial administrators unsuccessfully tried to coexist with a "Benthamite" reforming zeal. Like colonial translation and interpretation of the so-called ancient texts, colonial codification of custom thus subjected tradition to a transformative process. Furthermore, different colonial officials used custom in different ways, saw different realities and interpreted in dissimilar ways – all the while using Western concepts and classification categories in what they proclaimed was an enterprise for the preservation of indigenous custom.[78]

Although the above "narratives of colonial displacement" focus on the particular theme of colonial attempts at discovering, preserving, translating, restructuring, interpreting and in the process "transforming" religious as well customary law, they are also a subset of the larger category of the "narratives of colonial displacement" that make the "radical displacement argument." It is to this larger category that I now revert.

The "radical displacement" argument

In its simplest form, the "radical displacement" argument – both as an explanation of colonial design and agenda and as a description of the impact of colonial laws and legal system on Indian society – essentially states that the substitution of indigenous Indian law with the high culture of Western law was profoundly disruptive, both socially and morally.[79] This is because while Western law was meaningful and

[77] W. H. Rattigan, "The Influence of English Law and Legislation upon the Native Laws of India," *Journal of the Society of Comparative Legislation*, New Ser., 3(1) (1901), 46–65.

[78] See generally N. Bhattacharya, "Remaking Custom: The Discourse and Practice of Colonial Codification" in R. Champaklaksmi and S. Gopal (eds.), *Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar* (Delhi: Oxford University Press, 1996).

[79] L. I. Rudolph and S. H. Rudolph, "Barristers and Brahmans in India: Legal Cultures and Social Change," *Comparative Studies in Society and History*, 8(1) (1965), 24–49, 25.

acceptable in the West due to it being rooted in its historical experience (both in its evolution and in present application), it was "alien" in several important ways to India.[80] For instance, the adversary mode of Western procedure isolated the case and its litigants from their social context of family, caste and locality: it decided it in terms of victory and loss. By looking at a dispute purely in terms of a plaintiff and a defendant, such an approach precluded existing imperatives of abating conflict and promoting consensus, and thus harmony. The swift, cheap and intelligible justice of the village thus found itself ousted by a vexatious new system that escalated litigiousness and ensured that justice now came at a hefty price, with delay and at considerable inconvenience. A highly representative articulation of this position emerges in Bernard Cohn's micro studies of village communities in India. He analyzes how complex and intricate traditional dispute resolution mechanisms in a local region were adversely affected by British rule, due to its glaring omission and neglect of the same.[81] Cohn puts forward the thesis that the contemporary "slot-machine" approach of the post-independence Indian peasants toward law courts is the inevitable consequence of the British decision to establish courts in India that were patterned on British procedural law.[82] He states:

> The way a people settles disputes is part of its social structure and value system. In attempting to introduce British procedural law into their Indian courts, the British confronted the Indians with a situation in which there was a direct clash of the values of the two societies; and the Indians in response thought only of manipulating the new situation and did not use the courts to settle disputes but only to further them.[83]

According to Cohn, in contemporary Indian courts based on a British model, "law is used not for settling disputes, but for furthering them," and "the courts are looked upon as a place for harassment or a place in which to gain revenge."[84] Marc Galanter has also put forward very similar views. He has described post-independence Indian law as mostly "palpably foreign in origin and inspiration," and, therefore, "notoriously incongruent with the attitudes and concerns of much of the population

[80] Rudolph and Rudolph, "Barristers and Brahmans in India," 25–6.
[81] B. S. Cohn, "Some Notes on Law and Change in North India," *Economic Development and Cultural Change*, 8(1) (1959), 79–93.
[82] Cohn, "Some Notes on Law and Change," 90.
[83] Cohn, "Some Notes on Law and Change," 90.
[84] Cohn, "Some Notes on Law and Change," 92.

which lives under it."[85] This is due to "the apparent displacement of a major intellectual and institutional complex within a highly developed civilization by one largely of foreign inspiration."[86] Galanter breaks up the transformation of indigenous law in India into three phases. According to him: (i) the administration of indigenous law was moved from the informal tribunals into the government's courts; (ii) having made this move, the applicability of indigenous law was curtailed; and (iii) while being administered by the government's courts, indigenous law was transformed.[87] Looking at the colonial experience across India and South-East Asia, other observers like J. S. Furnival opine that the social disruption brought about by colonial rule was further aggravated by political dissolution. In his comparative study of the region, he asserts that everywhere the hereditary officer, who had formerly represented the organic village and tribal group, was absorbed into the Western system and converted into an instrument of foreign rule. This, according to Furnival, broke the political and social organization in villages. There remained, therefore, no political barrier against the spread of Western ideas. Furnival blames the enforcement of uniform law and other concomitants of Western rule as factors that tended to break up the village into individuals, encourage the assertion of rights by litigation and multiply the numbers of lawyers and moneylenders.[88]

Another variant of the "radical displacement argument" to be discussed in greater detail below brings forth important revisionist perspectives that have focused on many aspects of colonial rule: they raise serious and poignant questions about the actual "character" and "direction" of social change in colonial India.[89] These perspectives essentially take strong issue with a style of narrative, still being generated up until

[85] See Galanter, "Displacement of Traditional Law," 65.
[86] Galanter, "Displacement of Traditional Law," 65.
[87] Galanter, "Displacement of Traditional Law," 69.
[88] J. S. Furnival, *Progress and Welfare in Southeast Asia: A Comparison of Colonial Policy and Practice* (New York: Secretariat, Institute of Pacific Relations, 1941).
[89] D. Washbrook, "Economic Depression and the Making of 'Traditional' Society in Colonial India 1820–1855," *Transactions of the Royal Historical Society*, 6th Ser., 3 (1993), 237–63, 237. This argument will be discussed further later in this chapter, when I also examine another seminal contribution to this mode of thinking by this author, i.e. D. A. Washbrook, "Law, State and Agrarian Society in Colonial India" in C. Baker, G. Johnson, and A. Seal (eds.), *Power, Profit and Politics: Essays on Imperialism, Nationalism and Changes in Twentieth-Century India* (Cambridge University Press, 2009), Vol. 15, Pt. 3 (originally published as a collection of essays in a special issue of *Modern Asian Studies*, July 1981).

the 1960s, which conceived "the coming of British rule as representing the 'beginnings of modernization'" and perceived "Indian history in terms of an 'heroic' struggle to fulfill the civilizing mission."[90] Directly challenging the "desirable modernization" and "inevitable modernization" arguments embedded therein, this variant of the "radical displacement argument" employs the tools of comparative economic history in order to unpack nineteenth-century Indian history for a deeper understanding of what actually happened. Instead of unearthing any evidence of "modernization," this scrutiny divulges colonial rule to be pushing forward a process of redefinition and structuring of Indian "tradition" into society – leading to the assertion that such "pseudo-traditionalization" was a much more dominant social process of that period than any so-called "modernization."[91] This is noteworthy for the following reason. While the above-mentioned narrative strands making the "radical displacement argument" point out displacement of tradition by foreign ideas and modern structures as the major problem, this particular variant seems to state the opposite – i.e. that, at a significant level, colonial rule was actually responsible for pushing society back to a traditional, hierarchical and pre-modern mold, even as it was naturally moving forward. However, it can be argued that these two positions are not necessarily at odds. After all, the dollops of "tradition" that were ostensibly being fed to the Indians during the early period of colonial rule were apparently an entirely "new" product – as the previous section on the outcome of colonial translation and interpretation of tradition asserts. Thus, rather than being a preservation of tradition, it was a kind of "pseudo-traditionalization." There is room for robust debate, however, on the precise form, content and outcomes of this complex undertaking.

The "pseudo-traditionalization" served a purpose. While India was being re-traditionalized, as this argument goes, it also served as a "caricature of a typical non-western civilization," or in other words, "the Indian past became re-defined as static and mindless 'tradition,' to serve as '… the other' to modern Europe's self-flattering understanding of its own history."[92] The Saidian insight that, in a political culture whose key value was progress, the image of oriental societies as backward and inherently static served as a ready justification for their colonial

[90] Washbrook, "Economic Depression," 237.
[91] Washbrook, "Economic Depression," 239.
[92] Washbrook, "Economic Depression," 239.

domination, directly influences most of these critical perspectives.[93] In other words, the underlying thesis of this particular variant of the "radical displacement argument" is that, far from promoting any "modernization," the colonial impact actually contained anti-modernist and regressive tendencies. These tendencies arrested economic and social growth, and actually pulled Indian society back to a more hierarchical and feudal ethos and structure. Commentators of this persuasion describe how, by the middle of the nineteenth century, the economic depression, the colonial revenue collection offensive and the "neo-colonial reconstruction of tradition" had reversed indigenous growth and development patterns.[94] As a result, "out of a once highly mobile, commercialized and contentious society," the colonists "had created, albeit by complex means, an agrarian structure marked now by the appearance of 'feudal' hierarchy."[95]

Pointing out contradictions between formal statements of policy aims and the working practice of British rule, Eric Stokes has described the first century of colonial rule in India as one of stagnation.[96] Highlighting both inadequate capital investment as well as insufficient technical instruments for a development program (such as a communication network), he contends that most of the proposed colonial reform plans actually never materialized until as late as the 1860s.[97] The eventual impact of colonial rule on India during this period is, therefore, described as having resulted in "an aborted modernization."[98] The other important point to note is the insight that the rate of colonial impact was differential, and its development of its internal structure uneven.[99] In Eric Stokes's classic words, this made it paradoxically "at once free-trader and mercantilist, the fugleman of modernity and the latest of the predatory conquerors of Asia."[100]

While some of the aforementioned narratives making the "radical displacement argument" have primarily focused on deflating the "inevitable modernization argument," and especially the "desirable modernization

[93] E. Said, *Orientalism* (New York: Vintage Books, 1978).
[94] See Washbrook, "Economic Depression," 261.
[95] Washbrook, "Economic Depression," 261.
[96] E. Stokes, "The First Century of British Colonial Rule in India: Social Revolution or Social Stagnation?" *Past and Present*, 58(1) (1973), 136–60.
[97] Stokes, "The First Century of British Colonial Rule in India," 146.
[98] Stokes, "The First Century of British Colonial Rule in India," 153.
[99] Stokes, "The First Century of British Colonial Rule in India," 160.
[100] Stokes, "The First Century of British Colonial Rule in India," 160.

argument," others have provided additional descriptions of the actual state of the indigenous economy and society prior to colonial arrival. Evaluating the interplay of colonial law and colonial agrarian policy, they opine that contemporary perceptions of the decay and destruction of India in the eighteenth century were, more than anything else, a product of British writing.[101] Consciously or unconsciously, it is argued, these British narratives sought "to magnify and color the changes which took place in the eighteenth century to enhance the magnitude of their own 'achievements' from then onwards."[102] Colonial pursuit of political security and steady revenue extraction from land and other taxes actually led to a depression-like situation in the first half of the nineteenth century.[103] Later, the same British imperatives, it is argued, led to gradual underdevelopment in India at the end of the nineteenth century and the beginning of the twentieth century.[104] British apprehensions about upsetting the early political balance which they had established with mercantile and landed groups is presented as the primary explanation as to why they were unwilling to undertake any large-scale developmental activity in India.[105]

"Displacement" remains the overarching theme and primary finding of these narratives. However, their focus is more on the displacement of the natural progression of Indian economy and society that, they argue, was stalled, as colonial rule ushered in an economic, political and social model that helped to entrench its presence.

The "Foucauldian power-knowledge project" variant

What is clear so far is that the "radical displacement argument" embraces several variants, albeit not altogether very divergent ones in terms of their ultimate verdict. Arguably, the most radical of these variants, and also the one with the largest sweep and a clear preference to look at the entire colonial experience in India from the vantage point of a grand theory, is what I would term the "Foucauldian power-knowledge project" argument. This argument painstakingly deconstructs various colonial legal reform endeavors as premeditated and blatant power-acquisition and consolidation projects, while employing a framework clearly based on

[101] E. F. Irschick, "Order and Disorder in Colonial South India," *Modern Asian Studies*, 23(3) (1989), 459–92, 459.
[102] Irschick, "Order and Disorder," 459.
[103] Irschick, "Order and Disorder," 459.
[104] Irschick, "Order and Disorder," 459.
[105] Irschick, "Order and Disorder," 459.

Michael Foucault's "power-knowledge" paradigm.[106] Bernard Cohn's "Colonialism and its Forms of Knowledge" is a prominent and path-breaking example of such deconstructive explanation. Cohn provides a fascinating examination of the development of the "colonial forms of knowledge" as the establishment of a "discursive formation," the definition of "an epistemological space" and "the creation of a discourse (Orientalism)" that had "the effect of converting Indian forms of knowledge into European objects."[107] The colonial projects of "discovering," translating, interpreting, reinterpreting, codifying, implementing and eventually replacing Indian sources of law are seen by Cohn as ultimately an appropriation of Indian languages to serve as a crucial component of its construction of a system of rule.[108] Fascinating recent literature continues to employ this "power-knowledge" analytical paradigm to evaluate the colonial legal project. One interesting example is Martha Kaplan's evaluation of colonial rule in Western India after the British conquest of Maharashtra in 1818. While the literally more concrete manifestation of the "Foucauldian power-knowledge project" was the decision to build a panopticon prison in Pune and indeed elsewhere in India, Kaplan discusses, inter alia, how panopticism, as both an ideology and praxis, prevailed in multiple ways toward informing and bolstering colonial governance.[109]

In a similar mold, others such as Partha Chatterjee, in his seminal work "The Nation and its Fragments," postulate that the colonial project was one of "rationalization" of administration and "normalization" of the objects of its rule.[110] However, the issue of race kept coming up to emphasize the specifically colonial character of British dominance – at the same time as technologies of disciplining power were being assembled and put up in the colonial state. According to Chatterjee, the years after 1857 constitute an important period that shows this project coming truly to fruition. During this period, the bureaucracy was rationalized; the laws codified; and surveys, classifications and enumerations of all aspects

[106] M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1975).
[107] B. S. Cohn, *Colonialism and its Forms of Knowledge: The British in India* (Princeton University Press, 1996).
[108] Cohn, *Colonialism and its Forms of Knowledge*.
[109] M. Kaplan, "Panopticon in Poona: An Essay on Foucault and Colonialism," *Cultural Anthropology*, 10(1) (1995), 85–98.
[110] P. Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories* (Princeton University Press, 1993).

of India undertaken. It was within this framework of universal knowledge, according to Chatterjee, that the colonial complex of power and knowledge (and its objectification and normalization of the colonized) had to reproduce the truth of colonial difference.[111]

Displacement as a "negotiated cultural enterprise"

The overarching "Foucauldian power-knowledge project" explanation has its detractors. Dramatically describing the essential nature and modus operandi of the colonial legal system as "a despotism of law," Radhika Singha explores the colonial state's negotiations with existing indigenous normative codes, in order to reorder them to colonial notions of law and civil authority, and to also establish communication circuits with the ruled[112] – or, as she further puts it, "to build some discursive bridges with the religious and social norms of the subject population."[113] She highlights how these strategies could have unpredictable consequences, as they could reintroduce "denominators of social and ritual identity into procedures which sought to define a universal legal subject."[114]

This is in some ways reminiscent of David Washbrook's aforementioned discussion of the "pseudo-traditionalization" of Indian society, and the reintroduction and bolstering of a more hierarchical and feudal ethos and structure in the Indian polity. However, Singha also provides additional important insights. Her essential thesis is that, in its early years, the Company dominion was expounded with the rhetoric of reconciliation with the "laws and customs of the people." However, the mercantilist corporation eventually chose to desist in seeking legitimacy

[111] Chatterjee, *The Nation and its Fragments*.
[112] See Singha, *Despotism of Law*, p. xi.
[113] Singha, *Despotism of Law*, p. viii.
[114] Singha, *Despotism of Law*, p. xi. According to Singha, "the field of meaning invoked by the citation of a particular symbol of traditional authority could not always be controlled and restricted to the specific objectives of the state" (p. xi). At the same time, she says that "the Company's subjects were also impelled to accommodate themselves to the law, whether as a frame of reference to make their claims upon the ruling power, or to devise ways to avoid an encounter with its agencies" (p. xi). Singha acknowledges that the colonial state did persistently attempt to discover reference points to "indigenous law," but at the same time, it also constantly endeavored to enforce its expanded concepts of a centralized state authority – hence, the at times paradoxical and contradictory results. What thus emerged, as Singha shows, was a complex process, with constant pulls and pressures, which augmented or contradicted each other, with at times unintended consequences.

from and retaining an association with the distributive rituals of an indigenous kingship, and started moving toward the model of a more centralized, institutional authority.[115] Since the Company administration had a bureaucratic centralizing tendency, it did not want seepages of revenue along branch lines of lordship. Thus, certain aspects of its claim to legitimacy were now expounded through an "assertion of a difference from past regimes," which Singha characterizes as arbitrary despotisms.[116] The Company's governance itself, she asserts, was quite clearly authoritarian (but justified with the logic that that was what the "Orientals" were used to), though declared and presented as "bound by law."[117] Paradoxically, in other aspects, "the Company searched for cultural moorings in the traditions of rule associated with Mughal state and its regional successors. The criminal law, its machinery and procedure, was therefore tied up with earlier institutions, personnel and legal-sacral texts."[118]

[115] Singha, *Despotism of Law*, pp. ix–x.
[116] Singha, *Despotism of Law*, p. x.
[117] Singha, *Despotism of Law*, p. x.
[118] Singha, *Despotism of Law*, p. x. Singha focuses in her study on the penal law of early Company rule in India, in order to better understand "the range of social transactions which shaped the process of colonial state-formation" (p. viii). According to Singha, lawmaking was treated by the colonial state "as a cultural enterprise in which the colonial state struggled to draw upon existing normative codes – of rule, rank, status and gender – even as it also shaped them to a different political economy with a more exclusive definition of sovereign right" (p. viii). Apart from looking at arguments in earlier histories that focus on the institutional structure of British Criminal Law in India, and that largely evaluate it as a "modernizing endeavor" due to the "liberal reformist tendency of British rule," Singha points out an additional important evaluative dimension (p. viii). She argues that the colonial "legislative initiative cannot be traced only to the various crises of colonial order or to the inadequacy of particular laws" (which were criticized for being "expensive, time-consuming and conducive to litigiousness"), but to "a constant reworking of the ambitions and perspectives of political authority and the forms in which this was to be communicated" (p. viii). Singha says that colonial lawmaking was a process that was fraught with the potential of conflict. This was because "the British definitions of criminal liability conceptualized a realm of juridical power founded, in theory at least, on a notion of indivisible sovereignty with its claims over an equal abstract and universal legal subject," with legitimate violence being the sole prerogative of the state (p. viii). This brought it in direct conflict with other existing sources of identity as well as other claims to legitimate exercise of violence (p. ix). Furthermore, British magistrates and judges felt that Islamic law was too narrowly concentrated on the "consequences of the criminal act" as well as on the "claims made by the injured parties for compensation and retaliation" (p. ix). This perception was once again in conflict with the colonial administration's idea that it wanted to communicate "that the criminal act affected the interests of all, i.e., the public interest which the state represented, and punishment would be meted out in those terms" (p. ix).

Other critics of the macro perspectives provided by the "Foucauldian power-knowledge project" further emphasize the above approach and perspective. For instance, according to Lauren Benton, one cannot recognize "the systematic and pervasive elevation of state law to its authoritative position in the colonial order without losing sight of the contingent nature of this process, or of the complex interrelations of new models of governance in the West and local contests outside it."[119] She focuses, inter alia, more narrowly on institutional change and its meanings, as well as on the complexity of colonial and metropolitan cultural relations, while drawing on the distinctive nature of nationalist movements outside the West, as enunciated by Partha Chatterjee in "The Nation and its Fragments." Benton analyzes various aspects of the jurisdictional politics and disputes of the time and argues that "these conflicts simultaneously shaped the formation of the colonial state (and generally of the interstate order) and responded to contests over cultural boundaries in colonial settings."[120] She emphasizes the significance of these disputes in marking cultural difference, and their role in institution building, so that, through such disputes, "the state came to assume a special authority – an authority that subsumed alternative legal authorities and also monopolized claims to definitions of political identity."[121]

Emphasizing the element of local collaboration (similar in some ways to the focus on "collaborators" in the aforementioned "continuity thesis" put forward by certain historians of India), Benton says that even when "state dominance" had received formal recognition as the ruling principle for colonial rule in India, the colonial legal order continued to be characterized with a fair amount of "fluidity."[122] As a result, even though the colonial government put up seemingly precise jurisdictional boundaries, these boundaries were "inherently unstable" and, therefore, "subject to frequent revision."[123] This, for instance, resulted in frequent changes in colonial procedural rules as a reaction to the strategic maneuvering of these rules by "indigenous actors," especially by "indigenous legal personnel."[124] This persistent

[119] L. Benton, "Colonial Law and Cultural Difference: Jurisdictional Politics and the Formation of the Colonial State," *Comparative Studies in Society and History*, 41(3) (1999), 563–88, 563.
[120] Benton, "Colonial Law and Cultural Difference," 564.
[121] Benton, "Colonial Law and Cultural Difference," 564.
[122] Benton, "Colonial Law and Cultural Difference," 564.
[123] Benton, "Colonial Law and Cultural Difference," 564.
[124] Benton, "Colonial Law and Cultural Difference," 564.

contestation took place for the additional reason that the disputes over the rules providing the structure of the complex colonial order had an added significance for these "indigenous actors": they perceived them as "important, even vital, symbolic markers of the boundaries separating colonial constituencies," which boundaries then "signified judgments about the character of these groups and the qualities that separated them from one another."[125] Therefore, to Benton, much as it was inevitable for the inherently unstable and "carefully crafted legal pluralism" of the colonial legal order, to eventually move to a highly centralized, hierarchical order that rested on the ultimate authority of colonial courts – this path dependence or "institutional 'fix'" was not apparent to the participants in this process.[126] The upshot of Benton's thesis is as follows:

> The construction of the colonial state proceeded haltingly and in response to myriad conflicts over the definitions of difference, property, and moral authority. Indigenous litigants helped to shape change by crafting legal strategies to exploit the jurisdictional complexity of colonial legal orders. By analyzing such challenges and the response to them, together with pressures to reform colonial administration and the resulting tensions between imperial and colonial administrators, we can arrive at a view of the construction of the colonial state not as a product of either "external" forces or "internal" conflicts but as an example of a "colonial project" – a practice and institution both perpetuated in policy and emerging out of the peculiar dynamics of colonial cultural politics.[127]

Benton thus takes issue with the "Foucauldian power-knowledge project" and its description "of nearly complete displacement of an indigenous legal system by a European legal order."[128] To her, this long and complex historical process is correctly outlined, but not completely captured by Marc Galanter's description of "the 'absorption' of indigenous law into 'modern' British law," nor is it fully explicable by Bernard Cohn's explanation of "a transition 'from Indian status to British contract.'"[129] Like Singha, Benton draws attention to what she describes as the "contested" nature of the change in colonial India, and the

[125] Benton, "Colonial Law and Cultural Difference," 564.
[126] Benton, "Colonial Law and Cultural Difference," 564.
[127] Benton, "Colonial Law and Cultural Difference," 564–5.
[128] Benton, "Colonial Law and Cultural Difference," 565.
[129] Benton, "Colonial Law and Cultural Difference," 565.

"fragmented positions" of the adversaries contesting the jurisdictional disputes that influenced and characterized this change.[130] Although Benton agrees that by the end of the nineteenth century the nature of the authority exercised by state law had changed from what it was during the early days of colonial rule, her emphasis on the cultural, racial and ethnic contestations on and around colonial legal evolution is important for two reasons. The first reason is that it throws a different light on "displacement" as a consequence of colonialism and highlights the nature and extent of influence (or lack thereof) exerted by those being displaced in impacting the eventual shape of the colonial legal project. The second reason is that the emphasis on the "cultural," "racial" and "ethnic" nature of these contestations brings forth the significance of these non-legal dimensions to the colonized, who were ostensibly encountering an essentially "legal" paradigm change. This brings to light the complex impact of colonial law on a multi-ethnic and multi-cultural indigenous society – where success and failure of a legal system cannot be merely gauged through some simplistic binary notions of economic or political winners and losers.

Thus, "displacement" has to be understood at several cultural and societal levels, and not just at the economic and political ones. This is what I point to at the start of this chapter, where I emphasize the need to better appreciate popular ideological, political, ethical, cultural and emotional associations with "law" in order to better appreciate colonial "law's" actual impact – underscoring the need for deeper sociological analysis of colonial "displacement" of indigenous laws. A modern variant of the above argument can also be seen in a recent study on Pakistani rural Punjab that, inter alia, proposes that the defining features of colonial regimes endure in post-colonial societies, not because they are embedded within the formal institutions of the postcolonial state, but rather because petty landowners elect those with an interest in preserving

[130] Benton, "Colonial Law and Cultural Difference," 565. Although the contests, disputes, and legal maneuverings were obviously influenced by conflicting stakes in the changing revenue system or the development of a market economy in land, Benton's most relevant insight in the context of this chapter is her highlighting of the non-economic and non-politically focused dimensions of this contestation (587). The contests, as she says, were also about "cultural, racial, and ethnic boundaries" (587). These pervasive "struggles over definition of difference" tell us that colonial state formation cannot be comprehensively explained merely as the spread and enforcement of ideas and institutions emanating from the West. The enforcement of state law was reinforced, even if indirectly, "through appeals to its authority from social actors who were situated quite differently" (587).

them. This is so even though the strict terms of the laws may have undergone change through dramatic institutional reforms.[131]

Displacement as a function of shifting political and economic imperatives

While the aforementioned "narratives of displacement" highlight "culture" in various ways – as a variable influencing the formative periods of the colonial enterprise; as a terrain for constant contestations and negotiations between the rulers and the ruled; and as an eventual victim in terms of the range and depth of colonial "displacement" – other narratives focus on displacement variables essentially economic and political. Thus, rather than subscribe to a grand design of monolithic and systematic domination put forward by the "Foucauldian power-knowledge project" variant, this stream of the "narratives of displacement" emphasizes the important linkages between various stages of colonial legal development in India and the political and economic imperatives of the colonial government. They also extend prominence to the contributory role played by the various exigencies of time and place. In summary, they hold that the different phases of colonial rule in India were characterized by different social forces, and that there was considerable variation in the role played by the law as well as the nature of property rights that it sought to uphold. Revenue collection, for instance, was an imperative for the growing colonial state. It therefore permeated and influenced the nature of colonial land settlements in India's predominantly agrarian economy. This in turn was responsible for diverse processes of social change. From a methodological standpoint, these analyses emphasize the importance of looking not only at the courtroom, but also the significance of tracing back to their various origins the arguments and forces at play in the courtroom. Thus, they require careful consideration of the situation of the courts in the general Indian social context, in order to fulfill the wider analytical purpose of examining law's "social function."

David Washbrook's seminal work in this area, for instance, focuses on the nature of effective property rights in land – given the significance of agrarian relations in the structure of Indian society – with land remaining overwhelmingly the single most important source of wealth and base of production.[132] Washbrook defines and describes three

[131] See Nelson, "Making Sense of Property Rights."
[132] See Washbrook, "Law, State and Agrarian Society in Colonial India," p. 650.

considerably different phases of colonial rule in India. He terms them as the "mercantilist" phase, the "high colonial state" phase and the "incipient nation state" phase. These phases were influenced by different social forces and were distinct in terms of the nature of property rights that the colonial state wanted to preserve; they were distinct also in terms of the "use" of law for that purpose.[133]

In its initial phase from the late eighteenth century to the middle of the nineteenth century, Washbrook finds an inherent contradiction in colonial legal policy. He emphasizes that the principles of statecraft laid down in this early phase laid the foundations of the eventual Anglo-Indian legal system in India.[134] He highlights (while looking at colonial Bengal of the late eighteenth century), at one level, the colonial policy of commercial and economic development through emancipation of the individual from the weight of taxation, and also its encouragement for accumulation of private wealth and property through the development of a free market in all commodities, especially land.[135] At another level, however, he contrasts colonial attempts to define the bases of the private or personal law of its subjects, through reliance on existing customary and religious norms.[136] This "Janus-faced Anglo-Indian legal system" – a characteristic of the colonial legal system from the very start – he argues, rested on two contradictory principles, with different social implications. At one level, the colonial law "sought to subordinate the rule of 'Indian status' to that of 'British contract,' and to free the individual in a world of market relations."[137] Meanwhile, at another level, the colonial-backed personal law entrenched "caste, religious and familial" status as the basis of individual right.[138] These contradictions, Washbrook argues, deeply influenced the actual nature of effective property rights. They went a long way toward rendering the early colonial legal system contradictory and ineffective, with large gaps between practice and theory.[139]

While examining colonial law reform endeavors, as well as the actual functioning of the Company court system in the first half of the nineteenth century, Washbrook highlights colonial under-funding of as well as ineptitude toward legal reforms and the improvement of the

[133] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 711–13.
[134] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 651.
[135] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 652.
[136] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 652.
[137] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 653–4.
[138] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 653–4.
[139] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 654–8.

quality of its judiciary. Furthermore, he draws attention to, inter alia, scandalous delays, high costs, inefficiencies, unintelligibility of procedures and laws to the illiterate litigants, corruption, paucity of manpower dedicated to the task of legal institutional development and inadequate legal enforcement mechanisms.[140] Washbrook scathingly points out that "Indian property rights were left to be safeguarded by a legal system which could take up to fifty years to resolve a contentious case or which could order the re-trial six times of a suit for property worth Rs 6."[141] He goes on to say (something which is acutely reminiscent of critiques of the post-colonial South Asian legal systems) that:

> [I]n these circumstances, it may not be surprising that the courts were not always used for their "proper" purposes in seeking the speedy resolution of disputes. Often, they were seen by litigants merely as a convenient place in which to bury "bad" cases for years at a time, which might be lost if heard before unofficial panchayati tribunals.[142]

Not surprisingly, he concludes:

> If, after sixty years of experience in which they had come to know only too well the deficiencies of the courts, the Company government still attempted no remedy, it may be more reasonable to suppose that they were quite content with the apparent abuse of the law and intended it to be used in no other way than it was, and as its institutional structure suggested it should be.[143]

Washbrook's explanation for this sorry state of the early colonial court system is that: "early colonial India operated under a 'state mercantilist' form of economy in which the institutions of the '*ancien* regime' were made more efficient, brutalized and bastardized but, significantly, not dissolved."[144] So while the early colonial government, according to this perspective, avowed a commitment to creating a free market economy supported by the rule of law, in actuality, it did nothing but to entrench the existing revenue and surplus extraction regime.[145] Thus, says Washbrook, the colonial government's "elaboration of a legal system which treated and protected landed property as if it existed at a remove from the state, as a private subject's right, was pure farce (and plainly regarded as

[140] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 658–61.
[141] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 658–9.
[142] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 659.
[143] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 660.
[144] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 661.
[145] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 665.

such by the mind of local administration)."[146] All this, of course, squarely challenges the "inevitable modernization argument" as well as the "desirable modernization argument."[147]

It is only in the post-1857 phase of colonial rule in India under the Crown Raj – in what Washbrook calls the "high colonial state" phase – that we witness any major legal reforms.[148] Property law began to undergo important changes so that the gap between the concepts and practices of Anglo-Indian law was reduced; the incidence of litigation (especially pertaining to property, tenancy, rent and debt) grew dramatically; the legal system was streamlined and expanded; and the legal process was simplified and made less expensive, in order to cope with these developments.[149] Yet, in spite of this, Washbrook finds evidence of the aforementioned personal/public law contradictions continuing to present ambiguities, pressures and obstacles. These in turn contributed to a slowness and timidity in the colonial government's reforms of its laws, administrative structure and governance system in order to

[146] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 665.

[147] The logical question still arises as to what caused the pursuit of this farce, if indeed it was a farce. Washbrook only partially traces his explanations to accounts of the colonial rule's apprehensions in its first century about any disturbance of the then extant bases of religious and traditional authority unleashing revolt against it. Or indeed to the explanation that colonial rule's dependence on "ill-controlled collaborators" was a function of its administrative and political weaknesses (p. 665). He finds these explanations inadequate in the face of other "risks" taken by colonial policy vis-à-vis local sensibilities as to religious law, as well as other interests of "traditional elites" (p. 666). Similarly, he finds the colonial dependence on local collaborators argument to be "over-estimated" and "misunderstood" given that the colonial government otherwise demonstrated the "ability to change the groups from which it drew its intermediaries, and to regularly change individuals within the groups" (p. 666). Instead, he attributes colonial inability to restructure society, in order to direct it towards the "modernizing" direction in which it claimed to be steering India, to its imperative of reaping a high revenue yield and close political management of the economy, "without which it would have risked military defeat, bankruptcy and internal collapse" (p. 667). However, with heavy land revenue and colonial maintenance of the traditional institutions of its management, it was obvious that free market relations were not going to flourish (p. 667). So while it claimed to be protecting private interests, Anglo-Indian law, actually provided, during this phase of colonial rule, "a range of secondary services for the Company, both as 'state' and as 'shield' for European business interests, which helped to translate political power into money" (p. 668).

[148] 1857 of course marks the year of the great and eventually failed Indian war of independence against colonial rule. The year is often used as a very important signpost for a paradigm shift in colonial policies, attitudes, and modes of governance. 1858 saw the transfer of governing authority from the Company to the Crown.

[149] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 670.

accommodate the social pressures of the market capitalism that it was ostensibly introducing to India's agrarian economy.[150]

It needs to be clarified that the colonial policy paradox that entrenched certain agrarian hierarchies and processes (due to a complex set of reasons discussed by Washbrook), did not embrace notions of protection of any poor or vulnerable groups. The situation was quite the contrary, for they hardly figured in the policy equation, or as a factor to consider while extending colonial modes of access to legal courts and processes.[151] Overall, "the raj, then, was, or felt itself to be, in an acute dilemma. Having established a context for the capitalist development of agrarian society, it could see no way of allowing the corollarous social transformation to come about and survive."[152] In the context of this chapter, analysis such as Washbrook's ought to inform a re-evaluation of

[150] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 673–81.

[151] Washbrook also points out that colonial reforms towards introduction of a competitive capitalism were neither directed towards nor in any way wary of opposition from the poor and the dispossessed. He says: "… it was not so much the poor and the dispossessed who were going to be engaged and threatening revolt – or, if they were, the raj neither saw nor cared about them. Its advance palliative legislation did nothing for the landless and precious little for the two-acre ryot. Indeed, few of its processes and protections could be used if money and a degree of independence were not available. The archetypal occupancy tenant of the U.P. or peasant proprietor of the Punjab, whose interests were to be safeguarded, was conceived more as a substantial farmer than a marginal peasant" (p. 688).

[152] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 691. Washbrook sums up the phase of the "high colonial state," contrasting it with the earlier "mercantilist phase," as follows: "Conditions of market competition now touched the agrarian base and the law was assuming definitions of property right more suitable to a 'free' capitalist context. Yet it clearly did not go so far as to establish a basis of equal and individualistic competition. The state was maintaining and manufacturing social prescriptions which limited the consequences of competition and was trying to keep control over the land in the hands of existing agrarian corporations. To conserve society in this way, while at the same time sustaining some market dynamic, the raj undertook a delicate balancing act. Its laws sought to guarantee a level of returns to mercantile and rentier capital but, at the same time, to restrict the pressures which they could exert on agriculture. The law of property now was meant to serve as an instrument of compromise and took on suitably confused and contradictory forms" (p. 712). Washbrook also provides important insights into the last phase of Indian colonialism. He calls it the "incipient nation state." He describes how it was characterized by a different set of political and economic imperatives, including most importantly political stability. Hence, there was a shift in the definition and regulation of property rights from civil to criminal laws, leading to further changes in the legal governance framework (pp. 712–13). However, for purposes of this chapter, I stop with the brief overview above of Washbrook's second phase of the "high colonial state," as that is the period in which most of India's major legal codes and regulatory frameworks emerged.

post-colonial statutory books, regulations and social arrangements. After all, they still largely draw their inspiration, and in many cases, even their text, from this complex period of colonial history, characterized as it was by the interplay of many social and political forces that used law as their medium of contestation.

Washbrook's narrative also sheds new light on the notions of the development and independence of the judiciary in colonial India. The "inevitable modernization argument" and the "desirable modernization argument" convey notions of a strong and independent colonial judiciary and its vital facilitating role in the journey towards rule of law and economic modernization. Washbrook strongly differs with this rosy depiction. His findings paint a very different picture of the colonial judiciary – an institution he describes as essentially employed to serve colonial economic policy imperatives. According to Washbrook:

> … the notional independence of the judiciary from the executive, proclaimed in the Permanent Settlement, was never realized. Colonial India had no independent legislature or written constitution to act as a check on the executive, which actually appointed the judiciary as part of the civil service and changed the law as it pleased. The supposed autonomy of the judiciary was an illusion, perpetuated by colonial legitimating ideology, and the law was a department of the executive.[153]

Thus, quite apart from exposing the gaps between the official rhetoric of colonial law and its internal contradictions of underlying policy (for example, between public and personal law), this kind of narrative lays bare colonial law's secondary and instrumental role in pushing forward certain agrarian frameworks and market mechanisms, which constantly varied according to the colonial state's political and economic imperatives. This exposes the fallacy of looking upon British rule as "monolithic" and "omnicompetent," and reveals the points of weakness and deep contradictions in its essential structure.[154] In the context of this chapter, this type of narrative further underlines the necessity of avoiding any treatment of Anglo-Indian law as an autonomous piece of intellectual inquiry. It warns against looking at its structure and strictures in isolation from the societal context in which they existed – a mistake that lawyers are apt to make. There is a need, therefore, as Washbrook proposes, that the law itself should be conceptualized differently and

[153] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 714.
[154] Washbrook, "Law, State and Agrarian Society in Colonial India," pp. 711–13.

related to other aspects of the state and developing class structure – and that meanings need to be found in those relationships.[155] A conventional legal analytical approach that excludes these important dimensions can lead to, as Washbrook warns, what may seem like judgments of significance in terms of abstract ideological principles. These may be highly misleading judgments.[156]

The fallacy of the uniformity of colonial policy: the "narratives of displacement" focusing on regional variations and differential societal impact

The above category of the "narratives of colonial displacement" dispels the notion that colonial rule was "monolithic" and "omnicompetent" through its history. They also provide a fresh periodization of colonial rule and its different, at times paradoxical, policies, based on its shifting economic and political imperatives as well as its fluctuating agrarian and market policies. Law, according to these narratives, plays at best the role of a handmaiden in these endeavors. What is common to some of these narratives, as well as the earlier narratives focusing on "cultural displacement" and the "Foucauldian power-knowledge project," however, is a tendency at times to treat colonial methods and the resulting displacement as more or less uniform across colonial India. That the phenomenon of displacement was also geographically distinct in different parts of India, in terms of its ethos, strategy and output, is the fascinating focus of yet another category of the "narratives of colonial displacement." A representative example is D. H. A. Kolff's work describing the diversity of colonial experimentation in different parts of India. The upshot of his argument is that Calcutta, Bombay, Madras, and the Punjab during colonial times were diverse in many ways, and this diversity was matched in terms of the ethos and methodology of colonial legal engineering in these places.[157]

To Kolff, understanding post-colonial Indian law is impossible without tracing the origins of the major Indian legal codes introduced by the British in the latter half of the nineteenth century. Furthermore, to him,

[155] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 714.
[156] Washbrook, "Law, State and Agrarian Society in Colonial India," p. 714.
[157] D. H. A. Kolff, "The Indian and the British Law Machines: Some Remarks on Law and Society in British India" in W. J. Mommsen and J. A. de Moor (eds.), *European Expansion and Law* (New York: Berg, 1992).

as to Washbrook, it is inadequate to take up a lawyer's legal positivist lens to study the policies and arguments that led to British rules and regulations – as that would just furnish a partial view from the top. He therefore considers it necessary to step outside and look at the levels below the judge's courtroom in order to examine how colonial laws actually functioned in the magistrate's court, how they were actually administered and used by the police and the role they played in managing conflict at the village level.[158] Kolff describes the colonial legal framework in India prior to the introduction of the major legal codes – the tripartite yet organically whole "Indian Law Machine," as he calls it – as a system based on three different sources of law, namely: (1) wisdom literature – left to Hindu theologians, Brahmins and European philologists; (2) positive colonial law – a mix of English common law, *dharmashastra*, *Sharia* and compiled customary law – with the latter three subjected to uniform English court procedures and thereby distorted in the process; and (3) what he calls local law-ways.[159] Kolff then traces diverse philosophical influences at work behind the actual implementation of the law, finding ardent adherents of Bentham as well as Savigny in different provinces of British India. He identifies distinctive administrative styles on display in the different provinces, due to their distinct colonial histories, varying cultures and social dynamics, and the levels of their respective administrative and executive autonomy.[160] While there is much in Kolff's analysis that provides exciting frameworks for further analysis, in the present context, his most relevant insight pertains to the diversity of the ethos and form of colonial legal engineering in different parts of British India.

Kolff's description of varied British strategies to create different kinds of links between the three aforementioned sources of law in Calcutta, Bombay, Madras, and the Punjab reveal that none of the colonial approaches really had much to do with either the Indian cultural or intellectual past or its living reality. However, arguably some of this experimentation, for instance, the colonial focus on and primacy extended to local customary law in the Punjab, was at least closer, albeit superficially, to the Punjab's ground realities. By the mid 1850s, however, a sea change had taken place. The British relinquished the idea of creating something out of "wisdom literature," and moved instead to

[158] Kolff, "The Indian and the British Law Machines," pp. 203–4.
[159] Kolff, "The Indian and the British Law Machines," p. 207.
[160] Kolff, "The Indian and the British Law Machines," p. 220.

the task of introducing the great codes. What followed, according to Kolff, was the wholesale transplantation of foreign law and legal concepts in India due to commercial considerations. Further, since the colonial government's primary concern was really the market, it wanted to avoid any religious tensions arising due to interference in the "private" sphere. As a result, it formally introduced the "public" and "private" law distinction between law of the market and family law (personal law). The introduction of these "Classical Legal Thought" concepts in India in the latter half of the nineteenth century has a fascinating connection with the larger intellectual debate around the historical development of Classical Legal Thought, as well as its globalization and the subsequent emergence of its successor ideas in legal thinking.[161]

Narratives such as Kolff's provide very useful regional frameworks and foci for analyzing the complex diversity of British legal and social engineering in India, dispelling any misconceptions of a homogenous all-India colonial approach to law-making. It is also important to further emphasize the differential impact of these disparate approaches to colonial governance and law-making, as pointed out by commentators who have focused on this aspect. For example, Neeladri Bhattacharya's study of British attempts to codify custom in the Punjab puts forward the finding that etched in the eventual codes were the voices of property-owning elites reacting to growing population, the scarcity of land and its increasing value, and the imperatives of consolidation of rural power – hence the felt need to redefine customary practices.[162] Not only did the process of codification restructure rural power relations, it was also shaped by those relations. According to Bhattacharya, colonial inquiry into custom opened up a space for negotiation and conflict – negotiation and conflict over the truth of practice.[163] Bhattacharya shows how this led to preferential treatment by the colonial codifiers of voices belonging to the dominant lineage as compared to, inter alia, those belonging to lower castes, the "non-agriculturist" communities (a social category which in itself was a colonial handiwork) and women.[164] As a result, "the colonial regime of customary law thus sharpened the opposition between the

[161] For a fascinating study of this subject, see D. Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, DC: Beard Books, 2006). See also D. Kennedy, "Savigny's Family/Patrimony Distinction and its Place in the Global Genealogy of Classical Legal Thought," *American Journal of Comparative Law*, LVIII(4) (2010), 811–42.

[162] See Bhattacharya, "Remaking Custom," p. 47.

[163] Bhattacharya, "Remaking Custom," p. 44.

[164] Bhattacharya, "Remaking Custom," pp. 44–5.

outsiders and the insiders, the 'agriculturists' and the 'non-agriculturists,' the proprietary body and the lower castes."[165] Bhattacharya shows how the philosophy, ethos, policy considerations, design and process of colonial attempts to identify custom – which was at various levels essentially a dialogue between masters and natives – brought about a situation whereby "the native voice was inscribed within imperial discourse," but this voice was "constrained, regulated, and ultimately appropriated."[166] Further, "this was a male, patriarchal voice, the voice of the dominant proprietary body speaking against the rights of non-proprietors, females, and lower castes."[167] As Bhattacharya succinctly puts it: "Not all the native voices could be easily accommodated within the imperial discourse on customary law, not all the evidence was always recognized. Codification was thus also a process of silencing and erasure."[168]

The codification of custom in the Punjab was to have a permanent imprint and substantial ongoing ramifications. According to Bhattacharya, while customs were uncodified, they remained in the collective knowledge of the community, as a preserve of the community, and were interpreted and recorded in it through its institutions. With codification, the colonial regime appropriated the right of interpretation and rewriting. Now courts were to decide disputes, and judges reinterpreted them. Thus, codification shifted the very terrain on which conflicts over meaning were played out.[169] However, silently but steadily, alternative practices continued underneath all this – beneath the regime of the codes, there continued to exist the reality of uncodified practice.[170] Native discontent at the various displacements brought about by colonial codification manifested itself in various ways: "There were violations of rules, a public flouting of norms, a silent persistence with alternative practices."[171]

While Bhattacharya makes specific mention of the disempowerment of women under colonialism in rural Punjabi society – a consolidation of existing patterns of disempowerment as well as the creation of new ones directly attributable to the codification of custom in the Punjab – other commentators have exhaustively dealt with the experience of Indian

[165] Bhattacharya, "Remaking Custom," p. 46.
[166] Bhattacharya, "Remaking Custom," p. 47.
[167] Bhattacharya, "Remaking Custom," p. 47.
[168] Bhattacharya, "Remaking Custom," p. 50.
[169] Bhattacharya, "Remaking Custom," pp. 50–1.
[170] Bhattacharya, "Remaking Custom," p. 51.
[171] Bhattacharya, "Remaking Custom," p. 51.

women in colonial India. In particular, they highlight their special predicament under colonial law. Janaki Nair, for instance, discusses the various levels of female disempowerment triggered by colonial legal interventions even when the colonial law was ostensibly and rhetorically meant to introduce social reform for the benefit of women in certain favored areas by the colonists, such as *sati*, widow marriage and child marriage. Nair, among others, narrates the experiences of women under colonialism as a history within a history, demonstrating their very different concerns as opposed to those postulated by the colonial state during the high noon of colonial social reform. She analyzes how these concerns were routinely underplayed or superseded by the males – whether they were colonial reformers, orthodox locals or progressive natives – who at various levels used the question of social reform for the benefit of women as a pawn in their larger strategies for ideological and political domination.[172]

Other such "narratives of colonial displacement" focus on the explicit bifurcation in the colonial criminal law's treatment of individual and collective crimes in India. This is an additional fascinating facet of the theme of colonial legal and social engineering, and its complex interplay with legal theory, political and economic imperatives, and sociological variables. For instance, it is argued that this bifurcation of colonial criminal law led to the emergence of – alongside an explicit and overt "rule of law"-based English legal structure – an almost covert legal structure with different court procedures, definitions of acceptable evidence and even punishments for particular crimes.[173] The latter structure was, it has been suggested, expressly elaborated in order to effectively deal with collective crime – and was fundamentally brought about to control groups of people defined by the state as anti-social and anti-state.[174]

[172] J. Nair, "Social Reform and the Women's Question" in *Women and Law in Colonial India – A Social History* (Delhi: Kali for Women, 1996). Also interesting in this context is U. Chakravarti, *Rewriting History: The Life and Times of Pandita Ramabai* (Delhi: Kali for Women, 1998), which examines how the colonial state's new institutional structures, caste contestations, class formation, and nationalism transformed and reorganized gender relations. Uma Chakravarti also explores the nature of the new agendas being set for women, how these agendas were received by Indian women and in what ways and to what extent their consent to these – what she calls "reconstructed patriarchies" – was produced.

[173] S. B. Freitag, "Crime in the Social Order of Colonial North India," *Modern Asian Studies*, 25(2) (1991), 227–61, 231.

[174] Freitag, "Crime in the Social Order," 231.

One of the most telling dimensions of this approach was that many of the cultural prejudices displayed by the imperial government against groups that it progressively saw as criminal were actually inherited from its local informants. These prejudices were in turn legitimized as scholarship in subsequently constructed treatises. These treatises went on to form the basis of special legislation for these groups of people.[175] Sandra Freitag has proposed that such bifurcated legislation was strongly influenced by the "Pseudo-scientific Social Darwinism" of the times that explained criminality in genetic terms. This mode of thinking, she argues, directly led to the stereotyping of criminal tribes.[176] An additional underlying colonial motivation was the potential utility of laws meant for tackling group and organized crime, as a formidable weapon for curbing and punishing pro-nationalist political activity.[177] Scholarship reporting the progressive transition of the colonial legal system into Indian hands after the 1930s detects a shift in the attitudes of Indians – a discursive, ideological and often institutional preparedness for transfer of power.[178] Yet, the views of the resurgent Indian members of the judiciary, despite being progressive nationalists, on women for instance, were strongly influenced by their views on class and rank.[179] This indicates, as Partha Chatterjee says, "the class limits of progressive nationalism on the question of women."[180] The situation seems dissimilar when it comes to various other colonial attitudes and stereotypes, such as the colonial categorization of certain tribes and castes as criminal tribes and criminal castes. These attitudes and stereotypes continue to thrive in post-colonial polities such as Pakistan, particularly in the realms of policing and adjudication

Ideology, guinea-pigging, and displacement

Like the strain of the "narratives of colonial displacement" that focuses on disparate colonial impact according to region, gender and social class,

[175] Freitag, "Crime in the Social Order," 243.
[176] Freitag, "Crime in the Social Order," 247.
[177] Freitag, "Crime in the Social Order," 260. According to Radhika Singha, the formalization of a different standard of criminality for the "thug gang" or the "dacoit tribe" was not just "an unequal application of the law," but "these laws were also an aggressive abbreviation of judicial procedure which gave the stamp of due process to crude devices of policing and prosecution." See Singha, *Despotism of Law*, p. xv.
[178] See Chatterjee, *A Princely Imposter?*, pp. 375–6.
[179] Chatterjee, *A Princely Imposter?*, pp. 380–2.
[180] Chatterjee, *A Princely Imposter?*, p. 382.

various broader intellectual histories of colonialism provide additional insights into the conflicting ideologies that inspired, permeated and molded the colonial agenda. They bring forth the considerable influence of significant contemporaneous philosophical movements in Britain, particularly English Utilitarianism, on law making in India. Of primary interest to these texts is the post-Cornwallis period when colonial rule had transitioned from a romanticization and exoticization of the Indian past to a more self-assured and unabashedly anglicized mode. Eric Stoke's brilliant intellectual history of Indian colonialism underscores the importance of appreciating the jurisprudential and political philosophy debates that fuelled and guided colonial legal engineering. Stokes exhaustively explores the impact of Utilitarian thinking on colonial laws making in India, especially the post-1857 Indian legal codes.[181] The debate on the ultimate contribution of Utilitarian thinking to nineteenth-century colonial legislation in India is an ongoing one.[182]

While one can continue to debate the extent to which expedience influenced theory, English Utilitarians obviously discovered India to be a much more muted and uncomplaining captive audience for their experiments as compared to England. "Romanticization" increasingly gave way to demonization as popular colonial misperceptions and biases about India's past helped fuel and justify transformative legal reforms. Of particular interest in this context is the role of "myth-making" in the colonial legal and social engineering discourse on India. Notions of the inherent superiority of colonial law over India's indigenous legal systems – views that were given further impetus by Utilitarian giants like Jeremy Bentham and James Mill[183] – held sway over English lawgivers such as Macaulay.[184] Quite apart from encouraging disdain for what was

[181] See Stokes, *English Utilitarians and India*.

[182] Some recent commentaries have suggested that the colonial law reformers pragmatically redefined their Utilitarian ideals in view of the exigencies of the Indian practical setting. Having soon recognized the difficulties of imposing an ahistorical legal framework on India, which would have discarded all aspects of indigenous legal culture, the Utilitarians, they argue, soon agreed on a compromise. They accepted the limits of "their theoretical jurisprudence," and went on to tamper "its promethean contours to agree with the parochial restrictions of Indian society." See K. K. Raman, "Utilitarianism and the Criminal Law in Colonial India: A Study of the Practical Limits of Utilitarian Jurisprudence," *Modern Asian Studies*, 28(4) (1994), 739–91.

[183] See, e.g. J. Mill, *The History of British India*, 6 vols. (London: Baldwin, Cradock, and Joy, 1826).

[184] A. L. Harris, "John Stuart Mill: Servant of the East India Company," *Canadian Journal of Economics and Political Science*, 30(2) (1964), 185–202.

of merit and value in indigenous systems, such "myth-making" contributed righteous moral fervor and emancipatory self-congratulation to the task of treating India as a guinea pig for legal experimentation. The unabated characterization of traditional Indian polity and society as backward and inherently static served both as a ready justification for colonial domination, as well as ideological stimulus for British code-givers to India. Codification, of course, seemed to be the mantra of choice for the Utilitarians, who were invariably as disgruntled with the state of the law in England as they were in India. As David Skuy argues:

> The [Indian Penal] Code does not represent Britain's attempt to modernize India's criminal law, but rather its enactment reflected developments in England that led to a massive overhaul of England's criminal justice system; in effect, defects in England's legal system motivated the codification of Indian law.[185]

Thus, according to this line of argument, while drawing up a criminal code for India, Macaulay not only ignored Indian tradition, but also avoided English law as the ultimate blue print. Utilitarian zeal, as well as the prejudices against indigenous Indian criminal law embraced from his predecessors, played equally important roles in Macaulay's approach to law reform, as did the pursuit of the ideal of uniformity of law as an abiding concern for a modern state. While English criminal law of the time may not have been a confidence-inducing model for replication to Macaulay, this apparently did not dilute his broader conviction that Anglicization was the best route to progress towards modernization for Indians. This has been described as an instance both of arrogant British provincialism as well as a strategy of imperialism.[186]

It transpires, therefore, that India and Indian aspirations in general, and the aspirations of those belonging to the non-elites, the disempowered and the disadvantaged in particular, were rarely a factor in determining the contours of colonial legal codification. Law reforms in India actually mirrored developments in England, so that the needs of the English and not the Indian society were kept in view. And yet while indicting India's indigenous legal system(s) as primitive for their alleged failure in meeting certain colonial standards of certainty and humanity,

[185] D. Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies*, 32(3) (1998), 513–57.

[186] S. H. Kadish, "Codifiers of the Criminal Law: Wechsler's Predecessors," *Columbia Law Review*, 78(5) (1978), 1098–144.

the colonial law reformers omitted to mention that English law failed on these scores as well. Scholars have, for instance, contrasted the evident harshness and lack of sophistication – and indeed the blood-thirstiness – of the nineteenth-century British criminal legal system, as compared to the Islamic criminal law regime *en vogue* in Bengal and most of the rest of India, prior to colonial interventions. Interestingly, Islamic criminal law was paradoxically condemned by colonial administrators as being both too brutal (when "humanitarianism" was opted for as the framework of critique), as well as too mild (when "administrative efficacy" and "deterrence" were the policy goals of the day) – both lines of arguments conveniently used as justifications for reform.[187]

It has been contended that British contemplation of India was characterized by a lasting tension between two conflicting ideals – one of similarity, and the other of difference. While elaborating on the colonial creation and ordering of difference, Thomas Metcalf says:

> At no time was the British vision of India ever informed by a single coherent set of ideas. To the contrary, the ideals sustaining the imperial enterprise in India were always shot through with contradiction and inconsistency. At some times, and for some purposes, the British conceived of the Indians as people like themselves, or as people who could be transformed into something resembling a facsimile of themselves; while at other times they emphasized what they believed to be enduring qualities of Indian difference. Sometimes, indeed, they simultaneously accommodated both views in their thinking, making it perilously difficult to discern any larger system at all.[188]

Metcalf argues that throughout colonial rule, and especially between 1858 and 1918, it was the "idea of India's difference" that most powerfully influenced British conceptualization of India and the Indians.[189] Impressive recent scholarship has focused on how this "dynamic of difference" created under colonialism has had various very significant historical and contemporary manifestations in international law doctrines and approaches, which, though we often omit to ponder, germinated and evolved in the age of colonialism.[190]

[187] See Fisch, *Cheap Lives and Dear Limbs*.
[188] T. R. Metcalf, *Ideologies of the Raj*, The New Cambridge History of India (Cambridge University Press, 1994), Vol. III.4.
[189] Metcalf, *Ideologies of the Raj*.
[190] A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge University Press, 2005).

The "colonial dynamic of difference" and "separatism as a colonial construct"

Four additional interrelated themes have received considerable attention in modern historiography of colonial India. These themes have great relevance for contemporary justice sector reform discourses in South Asia. One of these themes has already been examined briefly, i.e. the colonial construct of pre-colonial India as a "despotism" – both as a crude and racist depiction of history, and also as a ready justification for colonial rule. This theme requires some additional attention because colonial depictions of Indian polity and society continue to impair post-colonial views of the pre-colonial past. Specifically, colonial historiography's leitmotif of "Indian despotism" persists in impeding post-colonial perceptions of the value of the traditional, the local and the indigenous – as relevant social factors, as well as potential repositories of workable frameworks for evaluating the purpose, efficacy and impact of post-colonial laws and legal systems. It would not be an exaggeration to say that much of post-colonial self-doubt and the consequent self-deprecatory attitudes can be majorly attributed to a highly noticeable lack of engagement with alternative historical knowledge. This is highlighted in particular by modern Indian historiography which roundly critiques the various familiar ways of looking at Indian history that were popularized or imposed under colonialism.

Recent general histories of South Asia, for instance, criticize the extant typical depictions of the Mughal era as "forged in a framework created by the British as they themselves devised a national history for their own emerging nation."[191] In this British self-vision, it is now argued, the picture that was fitted to the conquered nation was that of a "backward" and "incipient" people with a rigid culture, entrenched despotism and a gap between a native Hindu population and its foreign Muslim rulers – resulting in a fragile polity.[192] To this "sorry" state of affairs, the British claimed that they had brought "enlightened leadership" and "scientific progress." This particular schema held together not just the British writings on Indian past. Frequently, it also surfaced in anti-colonial nationalist historiography.[193] The enduring view of Indian society for

[191] B. D. Metcalf and T. R. Metcalf, *A Concise History of Modern India 2* (Cambridge and New York: Cambridge University Press, 2006).
[192] Metcalf and Metcalf, *History of Modern India*, pp. 2–3.
[193] Metcalf and Metcalf, *History of Modern India*, p. 3. This "exoticization" of the Mughal era as "Medieval India" or "Muslim India" further obfuscates, as contemporary critiques

popular consumption during the Raj was that of a simplistic bifurcation of the natives as either the humble people of the road or those who assisted the British in sustaining the Raj – this is amply on display in literary output during the high noon of colonialism, such as Rudyard Kipling's novel *Kim*.[194] It cannot be taken for granted that the popular post-colonial imagination has successfully overcome centuries of historical distortion, in order to be fully cognizant of modern historiography of India that claims:

> It is now emerging from scholarly research that pre-colonial empires, far from being centralized, bureaucratic autocracies, were flexible, nuanced, and overarching suzerainties. Although obviously bereft of modern democratic ideals, these empires and regional successor states had well-developed political concepts of both individual and communitarian rights as well as political theories of good governance.[195]

This brings us to the second important theme which continues to attract the attention of historians of India. It is the afore-mentioned "colonial dynamic of difference," which permeated various phases of colonial policy and molded much of its legislation. The extent to which such a dynamic ensured that the natives and European ruling elite and citizenry had different status and rights before the Indian courts, together with the immovable ceilings on the extent to which the natives could claim to be real "citizens" under colonialism can hardly be ignored as irrelevant for our times. This is not least because the post-colonial legal frameworks in the independent states continue to be influenced by colonial legal concepts, structures, and approaches. Can it then be said that "post-colonial" notions of "citizenship" have been completely emancipated from the much more limited concept of "subject-hood" under colonialism? In this context, it is interesting to briefly note that recent scholarly writings on this theme have drawn attention to the close interrelatedness of different codification endeavors in the European metropoles and colonial locales.[196] Directly germane to the present discussion, they highlight a hitherto largely neglected dimension of the colonial "rule of law"

of such historiography show: the historical evidence of the flexibility and openness of Mughal institutions; the distribution of power and authority among different levels of society; and the themes of dynamism, progress, change, and tolerance of diversity and difference that permeated society in that era (pp. 26–9).

194 Metcalf and Metcalf, *History of Modern India*, p. 133.

195 See Bose and Jalal, *Modern South Asia*, p. 202.

196 E. Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in British India," *Law & History Review* 23(3) (Fall 2005), 646–51.

enterprise, which was the repeated and largely successful resistance put forward by the non-official European population in India to the establishment of a uniform system of laws and tribunals.[197] As the colonial governments invariably compromised by extending concessions to this small but influential constituency – which essentially demanded to be treated preferentially on the basis of racial difference – it brought "to the surface internal tensions in liberalism and empire."[198] This was, it is argued, a direct outcome of "the paradox of creating democratic legal institutions in the context of an absolute authoritarianism."[199] Highlighting another crucial paradox of the colonial "rule of law" enterprise, Nasser Hussain's work brings forth the intractable tension between the colonial notion of "rule of law" and its invocation of "emergency powers" for tackling political crises. It also tracks the continuation of similar notions of "rule of law" and "emergency powers," as well as their tensions, in post-independence South Asia.[200]

Similar historical revisionism is currently being extended to existing understandings of anti-colonial nationalism. It is being argued that the vibrancy of the politics and culture of anti-colonial modernity is not adequately captured by sharp distinctions between "tradition" and "modernity," or "Indian tradition" and "European modernity." Therefore, it was not just in the stark "us" and "them" or "our past" and "their modernity" that anti-colonial intellectuals sought escape routes from colonial oppression.[201] In what has been described as the "arena of the decolonization of South Asian history," historians are highlighting "many contested visions of nationhood and alternative models of decolonized states in South Asian anti-colonial discourse," which "have gained heightened relevance in the new millennium."[202] They claim that the "historical specificities of the post-colonial political transition generally witnessed the smothering of diversity and the inheritance of colonial structures of state and ideologies of sovereignty by mainstream nationalist elites."[203] There was, however, a promise of a difference so that "[C]olonial subjects, so long denied and divided along lines of religion,

[197] Kolsky, "Codification and the Rule of Colonial Difference," 683.
[198] Kolsky, "Codification and the Rule of Colonial Difference," 683.
[199] Kolsky, "Codification and the Rule of Colonial Difference," 683.
[200] N. Hussian, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003).
[201] See Bose and Jalal, *Modern South Asia*, pp. 90–1.
[202] Bose and Jalal, *Modern South Asia*, p. 201.
[203] Bose and Jalal, *Modern South Asia*, p. 201.

language, tribe or ethnicity, were to be treated to the full-blown rights of equal citizens."[204] As the citizens of modern South Asian states well recognize, the jury is still out on whether the promise was kept.

Related to this is a third theme pertaining to the colonial modes of governance, such as the concentrated civilian bureaucracy with a paternalistic outlook but vast, iron-clad coercive powers. The strong and highly centralized executive-dominated form of government that continues a robust post-colonial existence directly traces its roots to executive governance in a "distinctly colonial form," through the district "collector" in charge of an administrative district under Governor General Warren Hastings. Themes of centralized government and racial exclusion run parallel, as the establishment of centralized colonial bureaucracy was followed by racist exclusionary policies of the Company Charter of 1793. The Charter stated that all civil appointments above a certain level of pay were to be held by those of British European origin. Meanwhile, the "district collector" was entrusted with the responsibilities of tax collection, with the control of police as a magistrate, and, quite often, with the additional role of judge. This raised him into the position of an omnipresent and omniscient veritable demigod in matters to do with revenue, policing, and justice.[205] Further reforms by Lord Wellesley, who formed in 1802 the College of Fort Williams at Calcutta in order to teach local languages to new officials, and also the establishment in 1804 of the College at Haileybury in England for training future colonial officials in India, created, it has been claimed, the "famed 'steel frame' of Indian administration," i.e. the Indian Civil Service.[206] Forged though it was to govern natives and not "citizens," the institutional structure and operational culture of the centralized and all-powerful colonial civil bureaucracy has continued resonance in the post-colonial context. It has been argued that whatever else may be the case the notion and rights of citizenship were not some of the boons on offer under colonialism. The crown raj made certain that it stymied any move towards the acquisition of substantive citizenship rights: "In colonial India there were to be no citizens, only subjects of the empire and of the 'traditional' princes."[207]

[204] Bose and Jalal, *Modern South Asia*, p. 201.
[205] See Metcalf and Metcalf, *History of Modern India*.
[206] Metcalf and Metcalf, *History of Modern India*, p. 60.
[207] See Bose and Jalal, *Modern South Asia*, p. 83.

Finally, there is the important theme of the "separatism" of the Indian communities. One aspect of this theme is "separatism" as a colonial construct, given sustenance by British historiography that depicted India as a land of various people who were clearly divided along religious, linguistic, and cultural lines. The other aspect is "separatism" as a deliberate colonial policy. Historians have recently exhorted the need to discard colonial definitions and bracketing of Indian society as "majority" and "minority," given the long tradition of rulers in pre-colonial India sharing out sovereignty along different layers of sub-continental polity.[208] They also point out how these colonial constructs led to fears of balkanization amongst anti-colonial nationalists, as "minorities" were seen as pawns in the hands of colonial rulers. This contributed, they argue, to these nationalists' treatment of even legitimate local and provincial concerns as distractions from issues concerning central state authority.[209] The resulting assertions of a singular, secular nationalism, at the cost of legitimate religious, linguistic, and other communal rights as well as necessary autonomy to diverse regions, continue to deeply divide post-colonial polities.

At the same time, "particularistic identities," howsoever much reinvented in the mold of colonial modernity, it is argued, cannot just be wished away and require accommodation.[210] "Separatism" as a colonial construct, as also the colonial policies promoting the notion of as well as status as "separate" communities, have been exhaustively explored in contemporary Indian and Pakistani historiography.[211] According to these texts, the second half of the nineteenth century pronouncedly evinces growing British conviction that the indigenous society was fundamentally divided along religious lines. Through their policies, the colonists solidified and intensified a sense of religious difference.[212] Sugata Bose and Ayesha Jalal succinctly capture the aforementioned themes, colonial constructs, and the myriad resulting dilemmas as follows:

[208] Bose and Jalal, *Modern South Asia*, p. 205.
[209] Bose and Jalal, *Modern South Asia*, p. 205.
[210] Bose and Jalal, *Modern South Asia*, p. 203.
[211] See F. Robinson, *Separatism among Indian Muslims: The Politics of the United Provinces Muslims, 1860–1923* (Delhi: Oxford University Press, 1993); and also A. Jalal, *Self & Sovereignty: Individual & Community in South Asian Islam since 1850* (New York: Routledge, 2000).
[212] C. B. Asher and C. Talbot, *India before Europe* (New York: Cambridge University Press, 2006), p. 291.

> The idea of unitary, indivisible sovereignty was a foreign import into Asia and Africa from post-enlightenment Europe. But there was an embargo on the export of rights of citizens of sovereign states to Europe's colonies. This distortion in the international trade in ideas of sovereignty and citizenship had large implications for the quest to achieve freedom and democracy without riding roughshod over legitimate communitarian rights. The colonial state in India claimed to occupy "neutral" ground above indigenous society which, in its view, could do no better than squabble over the sectional interests of its component parts. Through rigid classificatory schemes employed in colonial censuses and maps, the state made it harder to maintain the peaceful co-existence of multiple social identities, even though colonial constructs never wholly succeeded in shrinking the mental horizons of colonized peoples. Once colonial modernity had redefined "traditional" social affiliations, the way was open for the construction of divisive political categories that might deflect unified challenges of anti-colonial nationalists.[213]

All of these interrelated themes possess great post-colonial relevance as they provide vital insights into various colonial constructs, modes of governance, and institutions that continue to flourish in post-colonial India, Pakistan, and Bangladesh. Speaking of colonial constructs and divisive political and legal categories, it would be poignant to conclude by reiterating the post-colonial resilience of one such colonial construct that continues to cloud perceptions in post-colonial South Asia. In Robert Travers's words:

> Indeed, the way that the language of ancient constitutions worked to entrench the idea of Muslims as "foreign invaders," and the Hindus as the ancient "inhabitants of India" may have been one of its most important legacies in the longer term.[214]

[213] See Bose and Jalal, *Modern South Asia*, p. 202. See also Travers, *Ideology and Empire*.
[214] See Travers, *Ideology and Empire*.

2

Law in practice: the Lahore District Courts Survey (2010–2011)

Introduction

"The conquest of India was a conquest of knowledge."[1] Bernard Cohn's classic statement underscores the complex and sophisticated ways in which colonial accumulation, classification, and categorization of information about its subjects helped it to bind the vast social world of India in order to control it.[2] From mastering native languages and re-crafting local history to systematically observing, surveying, arranging, enumerating, documenting, codifying, and monitoring information that was collected from and about the natives in the vast laboratory that was India, the colonial government developed its technologies of rule. What inevitably followed were normalization, prescription, and directives for what was allowable and what was not.[3] As Cohn elaborates:

> They took control by defining and classifying space, making separations between public and private spheres; by recording transactions such as the sale of property; by counting and classifying their populations, replacing religious institutions as the registrar of births, marriages and deaths; and by standardizing languages and scripts. The state licensed some activities as legitimate and suppressed others as immoral or unlawful.[4]

In 1853 a certain Colonel Sykes published a marvelous report in the *Journal of the Statistical Society of London*.[5] In important ways this document demonstrates the rigor involved in monitoring and evaluating

[1] See B. S. Cohn, *Colonialism and its Forms of Knowledge: The British in India* (Princeton University Press, 1996), p. 16.
[2] Cohn, *Colonialism and its Forms of Knowledge*, p. 5.
[3] See generally Cohn, *Colonialism and its Forms of Knowledge*, p. 5.
[4] Cohn, *Colonialism and its Forms of Knowledge*, p. 3.
[5] See Colonel Sykes, "Administration of Civil Justice in British India, for a Period of Four Years, Chiefly from 1845 to 1848, Both Inclusive," *Journal of the Statistical Society of London*, 16(2) (1853), 103.

the courts in a bygone era when Indians were developing a taste for the joys – or in many cases were being extended no option but to expose themselves to the horrors – of Western-style adversarial litigation. Colonel Sykes' report on the "Administration of Civil Justice in British India, for a period of Four years, chiefly from 1845 to 1848, both inclusive" is a treasure trove of statistical riches. It builds on his two earlier 4-year evaluations conducted in 1843 and 1848 respectively. Thus, it undertakes an invaluable time series analysis encompassing a 12-year period. In table after table, the author documents and analyzes the numbers for case admissions, re-admissions, transfers and disposals in the various classes of courts across the different presidencies. He identifies those with maximum case pendency. He pays special attention to the number of cases settled with the mutual agreement of the parties, as well as to those that are indicative of vexatious litigation, having traveled up to the appellate levels. He gauges the allocation of workloads among different categories of judges, and the relative performance of the "native" and "European" judicial officers.

Not content with mere efficiency, he conducts a qualitative evaluation of the various lower courts on the basis of the number of appeals against their decisions, as well as the number of decisions reversed or modified. The author identifies bottlenecks in the court system, delineates the nature of the most frequent underlying disputes, and calculates the average duration of various kinds of suits and appeals as well as their monetary value. He ascertains the number of per capita suits in different localities, the number of decisions in favor of plaintiffs and defendants (thus indicating the extent of frivolous litigation), and the relative costs of litigation in different courts. He also evaluates the rigor of appointment and performance evaluation processes for native judges and lawyers. He does even more – this is just a representative sample of the scope and depth of his inquiry.

Colonel Sykes can be regarded as an archetype of the kind of inquisitive, diligent, and self-congratulating colonial operative often entrusted with regular and careful performance assessment of a colonial institution. Whether he was fully cognizant of the profound linkages between his painstaking duties and the deep, sinister murmurs of the power-knowledge dimension of his outputs or whether he was just a proverbial cog in colonialism's gargantuan wheel, or both, is an interesting separate line of inquiry. What we do know for a fact is that despite the millions of dollars spent in Pakistan over the past decade on "efficiency" enhancement, the various reformist utterances by the country's top judges both

pre and post the Lawyers' Movement, the several promises for change in the national judicial policy documents, the capacitated Law & Justice Commission and the new National Judicial Policy-Making Committee, salary raises, flash computers, and the veritable army of court administrative staff, one cannot find a single report half as rigorous as the one produced by a Colonel Sykes on horseback 150 years ago. Neither is one likely to appear any time soon as there are no plans as such to prioritize scientific introspection. What currently passes for official data is way too general, irregular, inconsistent, aggregated, and sporadically accumulated for it to be taken seriously. It barely presents a reliable picture of the very broad, let alone provides any meaningful insights into the particular areas of increased litigation and the specific vulnerabilities and lacunae of law, procedure, person, and process that contribute to not just backlog and delay, but to a highly disparate quality of justice. It is apparent that while the post-colonials chose to unquestioningly embrace various frameworks, mechanisms, processes, and attitudes handed down from their history of servitude, the culture and methods of careful quantitative and qualitative assessment of the output of their legal and court system were not. The following section will further discuss this post-colonial omission and neglect.

The Lahore Litigants' Study

Poverty, lack of education, unfamiliarity with the language of the laws and the legal system, complexity and unintelligibility of legal processes and procedures, asymmetries and disconnects between laws and peoples' actual problems as well as their social and cultural contexts, and several other personal, household, and contextual variables, have a direct nexus with legal disempowerment and access to justice. This is particularly the case in post-colonial contexts like Pakistan, which face deep and accentuating social, political, and economic disparities. However, the multifarious actual problems and challenges faced by disputants who seek recourse to the formal legal system in Pakistan remain inadequately theorized and empirically under-explored. Conspicuous by their absence are any attempts to deconstruct and analyze various factors that may contribute to the very emergence of recurrent and conflated disputes, elongated litigation surrounding the same, and the role played by acute social, political, and economic disempowerment in directly impairing citizens' capacity to advocate and defend their rights under the law and the Constitution.

The paucity of scholarly literature on and empirical attention to these issues is a universal problem. The scarce existing legal anthropological work has amply demonstrated that a purely lawyerly and judicial approach to peoples' "problems" tends to lose sight of the intent, aspirations, and expectations of ordinary people who bring their private problems to the public domain of the courts. In a ground-breaking legal ethnographic study of the lower courts in two New England towns, Sally Engle Merry shows that what litigants may consider as genuine problems meriting a legal remedy may end up being perceived and treated by court officials as "murky," "muddy," "difficult, troublesome and often frivolous," "garbage cases," "junk cases," "shit cases," and "low-status cases."[6] It is important to understand what people mean by their "problems," which, according to Merry, is a "folk-category and may be their term of choice for 'disputes,' which in turn is an analytic category."[7] It is necessary to appreciate the "folk concept of problem" as "problems are part of social relationships which contain many features besides those of the conflict. They are moments in an ongoing process of exchange of offense and counter offense, which stretches back in time. Problems are thus multifaceted and emotionally intense."[8]

Merry shows how even in a developed formal legal system like that of the United States, a contradiction exists between peoples' actual "legal experience" and their "legal consciousness."[9] The "legal consciousness" of the people, i.e. "the ways people understand and use law," may be very different from how the lawyers and courts perceive the law. People of course react and resist when they perceive their claims being "deflected, transformed, extinguished" and access is thus denied to legal remedies, and try and shape the legal system to their needs rather than be shaped by the legal system.[10] In the process, it has been argued, people's consciousness of the law undergoes change as they accumulate their realistic experience of dealing with the legal and judicial system.[11] This of course also underlines the significance of the situations in which individuals "use" the law.

[6] S. E. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-class Americans* (University of Chicago Press, 1990), pp. 14–15.
[7] Merry, *Getting Justice and Getting Even*, p. 89.
[8] Merry, *Getting Justice and Getting Even*, p. 96.
[9] Merry, *Getting Justice and Getting Even*, p. 134.
[10] Merry, *Getting Justice and Getting Even*, p. 180.
[11] Merry, *Getting Justice and Getting Even*, p. 5.

The question to ask, particularly in post-colonial societies like Pakistan that face even deeper discordance between their legal systems and their end-users – due to acute socio-economic disparities – is whether "law serves as an ideology with hegemonic characteristics – that it not only enforces compliance but also constructs a world which is accepted because it is legally ordered, even though some groups are privileged over others."[12] This is the "hegemony of law" that manifests in the "domination inherent in the imposition on subordinate groups of a persuasive image of a social order as being *just* …"[13] It is not hegemony through force, but a hegemony that relies on "legitimacy rather than force, on the consent of the governed rather than on coercion."[14] This is not to deny that as an ideology, law can have both "elements of domination and the seeds of resistance," so that it can be both the source of domination but may also contain opportunities for challenging domination.[15] The fundamental question arises whether the law has provided far fewer seeds of resistance against domination to the "vulnerable" groups in places like Pakistan, than it has created opportunities for domination by its elites. That is a question which cannot be adequately addressed unless the nature and extent of the "cultural hegemony of law" can be acknowledged and better appreciated through a contextually nuanced understanding of ordinary citizens' interaction with the formal court system.

Given the afore-discussed absence of any reliable official or unofficial data on citizen experience of courts and the formal legal system in Pakistan – and indeed the inconsistent and patchy aggregation of even some of the more fundamental statistics on court performance like those collected by Colonel Sykes, galloping around the countryside over a century-and-a-half ago – and the consequent lack of understanding of such citizen experience, this chapter attempts to partially fill this gap. It discusses the findings of an empirical evaluation of ordinary litigants' experience in the Lahore district courts (the "Lahore Litigants' Study").[16]

[12] Merry, *Getting Justice and Getting Even*, p. 7.
[13] Merry, *Getting Justice and Getting Even*, p. 7.
[14] Merry, *Getting Justice and Getting Even*, p. 7.
[15] Merry, *Getting Justice and Getting Even*, p. 8.
[16] The detailed results and analysis of the Lahore Litigants' Study are available as a Working Paper under the title O. Siddique, "Law in Practice – the Lahore District Courts Litigants Survey (2010–2011)" on the website of the Development Policy Research Center (DPRC), Lahore University of Management Sciences (LUMS), http://dprc.lums.edu.pk/components/com_publications/attachments/Law-In-Practice-Lahore-District-Courts-Litigants-Survey.pdf.

The district courts or the courts of first instance were chosen for this exercise as they are the avenue where most Pakistanis encounter their country's laws and legal system. In comparison to these, comparatively very few cases make it to the appellate courts. Since the impetus of the Lahore Litigants' Study was to understand actual (and possibly highly differential) citizen experience of dispute resolution in the formal legal system (as well as the non-court dispute resolution mechanisms in Pakistani society), it was designed to adopt and employ the various personal and household variables of ordinary litigants as evaluative benchmarks, in order to determine their correlation with popular experience of these dispute resolution systems. The Lahore Litigants' Study, therefore, identified, broke down, differentiated, and individually focused on important contextual facets of the disputes, the disputants, and the formal litigation/informal adjudication matrix in Pakistan. It brings into sharp relief the centrality of economic, political, social, and cultural disempowerments and inequalities of litigants, as determinants of legal empowerment and citizen capacity for rights protection, in addition to embracing the more general facets of disputes and litigation.

In terms of overall objectives, the Lahore Litigants' Study was primarily designed to understand the actual operation of the laws and legal system in Pakistan – i.e. "law in practice." Importantly, it attempted to uncover the nature and extent of differential citizen experience of these laws and legal system in terms of actual and perceived access, equity, fairness, and justice. It undertook this endeavor in two important ways: (i) by gauging the gaps between litigant comprehension of the law and the legal system and the essential prerequisites for adequate pursuit of a remedy in the formal court system; and (ii) by determining the extent of the respondents' social and cultural alienation, if any, with the forms, rules, procedures, etiquette, structures, nuances, and mechanics of a legal system created and established under colonialism. Furthermore, it explored an additional significant area of inquiry by conducting an impact evaluation of several major "delay reduction" and "efficiency" enhancement motivated justice sector reform projects in Pakistan that have more or less been the exclusive mainstay of its reform debate and agenda over the past decade.

In terms of methodology, the Lahore Litigants' Study is based on detailed interviews with 440 randomly selected litigants in the Lahore District Court Complex (the "Lahore Survey"). It covers the entire spectrum of civil disputes and litigation in Pakistani courts, ranging

from contractual and property disputes to family law and guardian court cases. The Lahore Survey was conducted in two phases. Experiences from the first phase were helpful toward amending and improving the survey technique and questionnaire (to which some additional questions were added) for the second phase. Quite apart from gathering quantitative data, the Lahore Survey was also designed to seek and record valuable qualitative feedback from the interviewees in order to highlight individual experiences and challenges. Further details of the nature, ambit, and methodology of the Lahore Survey; the structure and broad contents of the questionnaire; the processes employed for data collection, cleaning, quality control, finalization, and analysis; and the various challenges confronted during surveying, are contained in Appendix 1.

The Lahore District and the Lahore District Courts

The Lahore District Courts are located in the colonial part of Lahore, which is one of the oldest, culturally vibrant and architecturally rich cities on the Indian sub-continent. Lahore is the second largest city in Pakistan and also the provincial administrative capital of the Punjab – its largest province. The Lahore District Courts are the main hub of litigation in the Lahore District, which is predominantly urban due to the enormous size of Lahore (which has an estimated population of over 10 million).[17] The Lahore District Courts also cater to the vast suburban areas of Lahore as well as certain outlying rural areas. Two additional smaller court complexes situated in the Cantonment and Sadar areas of Lahore also serve the Lahore District's litigating public.

The selection of the Lahore District Courts for the survey is significant for several reasons. First, as the administrative and political capital of the Punjab and the location of several institutions of higher learning as well as commerce, trade, business, and industry, Lahore, and consequently the Lahore District, is the most developed area in the province according to

[17] For administrative purposes, the Punjab is divided into nine administrative divisions. Each division comprises a number of administrative districts, which in turn comprise a number of tehsils and towns. The total number of districts, tehsils, and towns in the Punjab is 36, 131, and 38 respectively. See *Pakistan Bureau of Statistics* (2008) and *Punjab Development Statistics* (2009) (Lahore: Government of the Punjab), p. 14. These administrative units vary significantly in terms of their size, population, and socio-economic indicators.

several socio-economic indicators.[18] With a more educated, affluent, and hence socially and economically empowered population, the litigating public that accesses the Lahore District Courts ought to be expected, therefore, to display greater legal empowerment vis-à-vis other inhabitants of the Punjab. On the other hand, if it emerges that they face several impediments to access and empowerment, the situation elsewhere in the province is bound to be bleaker. Thus, the outcome of the Lahore Survey was expected to provide not just insights about citizen experience of dispute resolution in Lahore, but a very useful evaluative benchmark for the state of affairs in other parts of the province. Second, situated only a few kilometers away from the Lahore High Court – the apex administrative and appellate court of the province – an evaluation of citizen experience of the Lahore District Court was further meant to facilitate impact assessment of the various justice sector reform programs introduced in Pakistan over the past decade, since the Lahore High Court controlled fund allocation and implementation oversight of these programs in the Punjab. The potential lack of any discernable positive impact of these reforms at the Lahore District Court would bode very poorly for the more peripheral, politically insignificant, and less empowered district courts elsewhere in the Punjab. Finally, while primarily an urban district, the Lahore District has sizable suburban and rural enclaves. Thus, it was hoped that it would provide access to a diversity of litigating population along the rural–urban spectrum, as well as a vast range of civil disputes and resulting contestation/litigation.

Access to and general environment of the Lahore District Courts premises

The physical accessibility, infrastructure, facilities and general environment of a court can be of significant relevance when it comes to ordinary citizens' quality of experience with the formal legal system – an

[18] See the *Multiple Indicator Cluster Survey* (MICS), Punjab 2007–8, Vol. I (Lahore: Bureau of Statistics, Planning and Development Department, Government of the Punjab, 2008). MICS is a regularly conducted governmental survey in Punjab. It is based on detailed household interviews covering the entire province in order to gauge the performance of various tehsils and towns along several social and economic performance indicators. It then ranks the same according to their performance along these indicators. The most recent MICS was completed in 2008. According to this survey, all nine towns comprising the Lahore District fall in the upper tier of the more socially and economically developed areas of the Punjab. The Lahore District's total area is 1,772 sq km, and its population was 6,318,745 (81.17 percent urban dwellers) according to the 1998 population census of Pakistan.

interaction that can be for many, to start with, quite alien and intimidatory. Considering the vast geographical jurisdiction of the Lahore District Courts, physical proximity and ease of transportation are important factors determining access to courts. This is especially so if many of the litigants have no choice but to use expensive and highly unreliable, uncomfortable, and at times fairly unsafe public transport. Almost 74 percent of the respondents reported that they lived over 10 kilometers away from the court. Of the respondents, 16.5 percent actually reported a distance ranging from 30 to over 50 kilometers between the court and their places of abode (7.5 percent of them reporting a distance of over 50 kilometers). At the same time, 56 percent of the respondents reported using public transport. If one adds to this the number of those who reported that they came to the court on foot, by bicycle, or through miscellaneous other mechanisms not involving use of efficient private transport, the number rises to 60 percent. No wonder many of these respondents complained that merely getting to the court on a regular basis was a major challenge.

The state of the court premises is another challenge. The "*Aiwan-e-Adal*" (literally, the "Hall of Justice") is the official name of the main premises that house the civil courts of the Lahore District.[19] Situated in the heart of the old colonial part of the city, it comprises a couple of large and drab four-storey buildings which are connected by bridges at the third and fourth floors. It is surrounded by smaller structures and fronted by a very busy road. Upon entering through the main portal, one finds oneself surrounded by hundreds of tin-roofed sheds and flimsy make-shift wood and board structures that act as lawyers' offices or the work places of several service providers to the court operations. The area is crowded during court hours by lawyers, law clerks, litigators, visitors, legal paper sellers, court staff, photocopying and typing service providers,

[19] As mentioned previously, the other locations that house civil courts for the Lahore District are in the Cantonment and Sadar areas of Lahore and are known as the Cantt courts and the Sadar courts respectively. The *Aiwan-e-Adal*, however, is the headquarters of the civil court system for the district, and houses most of its civil judges. Located a few hundred meters away are additional court premises that house more civil court judges, civil judges with powers of the district magistrate to hold trial, additional district and sessions court judges, the office of the Senior Civil Judge, Lahore (administrative in-charge of all the civil judges in the district), and the office of the District and Sessions Judge, Lahore (administrative head of the entire district court judiciary, including all civil and criminal court judges). Part of the Lahore Survey was carried out at these premises as they also house the family court judges.

tea and snack vendors and various other ancillary operatives and functionaries of the court system, unofficial underlings and minions, court birds and other frequenters of the courts who may or may not have any particular reason for being there, and *touts* (a local term for intermediaries or go-betweens, who at times are unscrupulous lawyers, allegedly acting illegally on behalf of court staff and/or judges and the disputants for "arranging" or "expediting" cases for a fee/bribe). The main buildings contain courtrooms, retiring rooms for judges and work spaces for the court staff. These are fronted by open corridors, with occasional cement benches for public use.

Elsewhere, courts are mostly locations characterized by a solemn dignity. The Lahore District Courts, and indeed invariably all district courts in the country, however, frequently present a spectacle. The ground-floor corridors are especially cramped and difficult to navigate due to encroachment by chairs, desks, and benches belonging to lawyers. Together with an additional chair or two or a bench for clients, these constitute the entirety of their office space. These chairs and benches are invariably chained to the walls for safekeeping and display the names and qualifications of their owners. The outer walls of the court premises are covered by the name plaques of lawyers and the visiting cards of candidates contesting the district bar elections as well as their supporters. The various entrances to the court premises are manned by the police and electronic scanners due to the country's security issues. The buildings house around sixty to seventy courts that are presided over by civil judges of various pecuniary jurisdictions, family court judges, guardian court judges, and civil judges who also have jurisdiction over rent disputes.

Bustling and cramped even on ordinary days, the court premises are particularly chaotic during the frequent elections of different legal bar associations. At the time of the Lahore Survey, the passageways, corridors, verandahs, courtyards, and the few available open spaces were thronging with chanting supporters of different candidates engaged in frenzied election activity for the Lahore District Court Bar, handing out promotional materials to passing lawyers. On one of the Lahore Survey days, the entire main courtyard of the court premises was covered by a large tent and the supporters of an election candidate spent the entire morning and early afternoon in election canvassing followed by an extended meal. On two other Lahore Survey days, court proceedings were interrupted for the better part of the day by striking lawyers who were protesting against the abduction and murder of a fellow lawyer in a small Punjabi town. On another Lahore Survey day, all of the judges were

attending an administrative meeting and hence court proceedings came to a standstill for half of the day. The constant bustle, crowds, and at times unsavory characters that frequent such public places add to the already closed, suffocating, and unpleasant mood of the place. During the Lahore Survey, frequent power cuts enveloped the courtrooms in darkness, and court activity slowed down considerably as court staff could not operate their computers or copy documents on copying machines, etc. due to lack of power backup. Furthermore, the courts present a predominantly male-dominated environment, despite the presence of a not insignificant number of female lawyers.

Although the official court hours were from 9.00 am to 4.00 pm, one observed during the Lahore Survey that by 1.30 pm judges would normally be done with the day's hearings and crowds of litigants would start thinning out. While many of them seemed not to have made any appreciable progress in their cases, it was more or less generally understood that there would be no more court activity after 1.30 pm. Many of the litigants could then be seen thronging outside the judges' staffs' offices, seeking the next dates of hearing. The shortened court day meant more frenzied activity in the mornings, with litigants who invariably looked harried and preoccupied. On the other hand, disruptions in court proceedings due to absent judges, power cuts, or demonstrating lawyers produced long periods of inactivity and uncertain waiting.

The court premises have minimal basic facilities. The only public seating arrangements are occasional cement benches. Due to the constant rush, it is a struggle to even stand comfortably in the exposed corridors, verandahs, and bye-ways of the court premises. There are few public lavatories and a small fee is charged for using them – which was described as a financial burden by some obviously very poor litigants who regularly came from long distances and spent the entire day on the court premises. There is a single, partially covered, ramshackle cafeteria within the court premises to cater to the thousands of people who come to the court every day. It offers meager and, for many, highly over-priced, fare. There is another cafeteria – both covered and more comfortable – for exclusive use by the lawyers. Furthermore, the open corridors, especially on the upper floors of the court premises, are exposed to cold winds and freezing temperatures in winter and scalding conditions in the summer. Not surprisingly, over half of the respondents (59.5 percent) expressed varying levels of dissatisfaction with the physical infrastructure of the courts and the facilities provided for litigants. Leaving aside the almost 10 percent who were indifferent to this question

and did not respond, only 30.5 percent of the respondents did not have any complaints and were either "satisfied" (29 percent) or in the case of a miniscule component even "highly satisfied" (1.5 percent) with the infrastructure and facilities.

Popular perceptions of the court experience

Before examining additional feedback from the Lahore Survey, it may be poignant at this stage to mention popular general citizen perceptions of the Pakistani formal court system. Urdu – Pakistan's national language – and the various Pakistani regional languages are replete with adages that describe the plight of those facing the predicament of being implicated or embroiled in a court case. One such well-known saying in Urdu is: "*Khuda beemari aur kachehri sai hamesha bachaay*" ("May God always save one from illness and the courts").[20] A ubiquitous threat invariably uttered by the archetypical villain in popular Punjabi movies while harassing his meek, law-abiding victim is: "*Tenon adalatan dai chakar lawa lawa keh maran ga*" ("I will kill you by wearing you down by interminably dragging you through the courts"). The courts in the popular Pakistani imagination are akin to an ordeal – a veritable trial of body and spirit. Many of those interviewed in the Lahore Survey shared a familiar sense of despair. One interviewee emphatically said, "I would not wish a court case on anyone";[21] another claimed, "I even pray for my enemies that they don't have to face the courts."[22] A drastic forewarning came from a Christian respondent involved in litigation over a residential property: "If Harrison William does not get justice he will commit suicide."[23] A female respondent was extremely upset during the course of the interview and started shouting outside the courtroom in which her case was to be heard, "If you don't give me justice I will assemble local people and occupy my usurped land myself."[24] Another respondent cynically remarked, "This is Pakistan. How can you expect justice?"[25] Yet another interviewee voiced what many described about the social stigma attached to not being able to resolve one's disputes and thus

[20] Also voiced in Interview with Respondent No. 183, December 23, 2010.
[21] Interview with Respondent No. 400, January 7, 2011.
[22] Interview with Respondent No. 184, December 24, 2010.
[23] Interview with Respondent No. 40, December 20, 2010.
[24] Interview with Respondent No. 188, December 24, 2010.
[25] Interview with Respondent No. 63, December 21, 2010.

having to come to court: "Which respectable person wants to come to court? It's only under compulsion that one comes here."[26] Others took a longer-term but equally bleak view of things: "I have been a citizen of this country for 62 years and I have not even witnessed 1 percent improvement in the court system."[27] These comments convey both a wide range and depth of experience. What follows is statistical analysis of the overall feedback from the Lahore Survey population, as well as additional instances of qualitative information. As will become evident, the aforementioned comments are not isolated rants or random utterances of anguish.

The respondents' profiles

As was hoped, the randomly selected Lahore Survey sample presented the expected diversity of the survey population. In terms of placement along the rural–urban spectrum, 60 percent of the respondents lived in the city of Lahore, whereas the rest came from the suburbs (29 percent), small towns outside Lahore (4.5 percent), and surrounding villages (6.5 percent). The location of disputes closely correlated with the respondents' place of abode, with 59 percent of the disputes located in the city and the remainder in the suburbs, small towns, and villages around Lahore. In terms of gender, although just over three-quarters of the respondents were male (76 percent), the Lahore Survey managed to capture the feedback of a sizable number of female respondents (24 percent). The female respondents were predominantly engaged in litigation in the family and guardian courts.

Although religion, sect, ethnicity, and caste did not emerge as significant variables in the Lahore Survey, existing literature as well as the patently multifarious diversity of the inhabitants of the Punjab and their social and cultural practices indicates that these may well be very important personal variables for determining the underlying nature of disputes as well as popular experience with the legal and court system in the rest of the province. This would be especially true for the more far-flung and less uniform rural and semi-urban areas. However, according to the Lahore Survey, these variables did not seem to have triggered or influenced in any significant manner the disputes and resulting litigation in

[26] Interview with Respondent No. 42, December 20, 2010.
[27] Interview with Respondent No. 106, December 22, 2010.

the Lahore District, possibly due to its predominantly urban nature and comparatively higher levels of education and economic affluence.

Education and monthly household income, however, turned out to be much more significant variables in terms of differential citizen experience with formal and non-court dispute resolution mechanisms, as will emerge during the course of this chapter. One significant finding was the immediate contrast that came to light in the educational qualifications of the litigants, even in a socio-economically developed district such as Lahore. It became apparent that as many as 25.5 percent of the respondents were either completely uneducated (just over 15 percent) or had only received education up to or equal to primary school (5 years of schooling). This rises to 36 percent if we include those with education up to or equivalent to secondary school (8 years of schooling) and 57 percent if we include those with education up to or equivalent to matriculation (10 years of schooling). Only around 41 percent of the respondents had received a college education up to a certain level. The data on the monthly household income of the respondents also reveals wide-scale economic constraints. Almost 63 percent of the respondents reported a monthly household income of less than or equal to Rs. 20,000 ($235) per month (falling in the two lowest tiers of monthly income listed in the Lahore Survey). Furthermore, 83 percent of the respondents fell in income categories below or equal to Rs. 50,000 ($588) per month. Importantly, 38.5 percent of the overall respondents actually fell in the lowest tier of monthly income of less than or equal to Rs. 10,000 ($117). This shows that while Lahore may be a more socio-economically developed district in the Punjab in relative terms, in absolute terms a vast majority of its randomly selected litigants were not much above the official minimum wage of Rs. 7,000 per month ($82).[28]

A sizable chunk of the litigants were above 60 years of age and in some cases older than 70 (16.5 percent). Most of the respondents were between 25 and 40 years old (32.5 percent), followed by those between 40 and 50 years old (23 percent), 50 and 60 years old (21 percent), and 18 and 25 years old (7 percent). In terms of occupation, private businessmen, house wives, retired government or private company employees, government employees, landowners, craftsmen, private company employees, shop owners, and professionals dominated the survey population, in that

[28] For the new minimum wage under Pakistan's new Labor Policy 2010, see "Rs. 7,000 Minimum Wage under New Labour Policy," *The Daily Times*, May 2, 2010, www.dailytimes.com.pk/default.asp?page=2010\05\02\story_2–5–2010_pg1_1.

order. Agricultural laborers, industrial laborers, industrial employees, agricultural tenants, small, medium, and big industry owners, students, and the independently wealthy as well as the unemployed also made an appearance in the sample. Thus, there was considerable diversity in the reported occupations and consequent variation in the nature of disputes which brought these interviewees to the court.

The cost of litigation

On a cold morning during the survey, the author headed to the court cafeteria for some tea. An old, poorly dressed man huddled in a corner. The author discovered that he was embroiled in long drawn-out litigation over a small parcel of land. He told the author of the great discomfort and expense of frequent travel from his village to attend court hearings. The author offered him tea. He smiled and declined. The author insisted. He confided in an embarrassed manner that if he took tea, it being cold he would soon have to use the toilet facilities. The overseer charged 5 rupees (a little over US $0.05) per visit. He anticipated a long day and additional expenses, and hence could ill-afford such indulgence.

Given the monthly household income profile provided above, this is a good place to compare that information with the reported financial cost imposed by litigation in the Lahore District Courts and gauge the relative financial burdens of litigants of very meager means. The high cost of elongated litigation was the theme of quite a few comments, some of which indicated that the steepness and financial burden of the costs made the ultimate gain from litigation rather meaningless. According to one respondent:

> The cases never get resolved. The courts keep giving date after date for the next hearings. People get destroyed in litigation. The courts have become like shops. As long as you can pay bribes you can delay a case forever and coerce your opponents and tire them out. You may be fighting for something worth Rs.2 million and your case will remain interminably stuck as your opponent will bribe the court staff with a mere two hundred rupees in order to ensure that the case hearing does not take place. And he will carry on doing this hearing after hearing after hearing.[29]

Another respondent shared: "If you ask me how much money I have spent so far on this case, it is limitless like the waters in the ocean."[30]

[29] Interview with Respondent No. 206, December 24, 2010.
[30] Interview with Respondent No. 182, December 24, 2010.

To get an overall perspective on the burden of litigation, respondents were asked to provide a rough estimate of their financial outlay on their legal cases. This is of course a relative burden and the monthly household income of the respondents has to be taken into account. Of the overall respondents, 38 percent reported an outlay of up to Rs. 50,000. Those reporting an outlay of greater than Rs. 50,000, or saying that the litigation had been carrying for so long and had been such a drain on their resources that they had lost count, amounted to 50 percent of the overall respondents. On the higher end, more than one-third of the respondents (38.5 percent) actually reported that they had spent up to or over Rs. 200,000, or that the litigation had been carrying on for so long and had been such a drain on their resources that they had lost count. It is quite telling that as many as 10 percent of the overall respondents stated that the length of their litigation and the enormity of their accumulated financial outlay had caused them to lose count of how much they had spent. Awareness and availability of free legal aid was essentially non-existent: this emerged with stark clarity as a mere 1.36 percent of the overall respondents said that they had ever heard of or had availed themselves of free legal aid during the course of their litigation.

The underlying disputes

The nature of the recurrent and embroiled legal disputes in a society provides good insights into its underlying strains and contestations. Land and property emerged as the most common reasons for disputes in the Lahore Survey. Collectively, they accounted for over half (52.5 percent) of the reported disputes.[31] In addition, 10.5 percent of the respondents reported marital disputes, 7.5 percent reported transactional/contractual disputes, another 7.5 percent were involved in guardianship disputes, 6.5 percent were contesting inheritance disputes, 5 percent of the respondents were embroiled in family disputes, and 3 percent of the respondents were involved in disputes over rent. When asked to elaborate upon the nature of their land and property disputes, the respondents reported various aspects of the land law regime, chiefly title, registration, acquisition, transfer, and partition, as the main terrains of dispute. A recurrent reported issue was what is referred to in local parlance as "land grabbing"

[31] A little over 8 percent of the respondents reported agricultural land disputes; around 21.5 percent reported commercial land/property disputes; and another 23 percent reported personal residential property disputes.

(a term used to describe fraudulent possession of property through the use of fabricated documents and/or violence). A staggering 15 percent of the overall respondents categorized their disputes in these terms. They also reported the wide-scale existence of organized "land mafias" involved in illegally occupying vacant, unoccupied, or disputed pieces of property for selling them off, or engaged in undertaking such illegal occupation on behalf of a contesting party that sought forced possession of a disputed property. In a context devoid of credible official or unofficial data on the nature of cases in the country's courts, the diagnosis of factors/legal gaps contributing to excessive, frivolous, and/or coercive litigation as well as any consequent reform is bound to be impaired. The above, therefore, are important findings about the nature of the Pakistani litigation terrain. The country's complex land titling, registration, acquisition, transfer, and partition regimes are spread across multiple laws and regulations that have not received any serious review and modernization over the years. As a result, there has been no scrutiny of how recurrent disputes may be triggered and/or exacerbated due to inadequate, weak, or flawed legislation and regulation.

A significant sociological insight provided by the Lahore Survey is that there were almost as many respondents in the Lahore District Courts contesting legal cases with parties that were wholly unrelated or unconnected to them (50.25 percent) as there were those embroiled in litigation with immediate or extended family members, members of their larger clan, or with a rival political grouping (49.75 percent). The more or less equal ratio in the Lahore District Courts of non-family or non-clan disputes on the one hand, and family and clan-related disputes on the other, is unsurprising given the highly urban nature of the district – a relatively greater prevalence of the latter can be safely projected in the rural and semi-urban areas of the country with less atomized, urbanized living patterns. As a consequence, compared with a reasonably anticipated higher reporting of greater social significance attaching to more traditional notions of cohesive and inter-dependent large families and clans elsewhere in the country, fewer respondents in Lahore reported this phenomenon. Thus, not only did the Lahore Survey adduce relatively fewer cases involving disputes within *Khandan* (Family) and *Biradari* (Clan), but also consequently weaker societal imperatives for resolving any and all disputes within the *Khandan* and *Biradari*. This underscores the importance of bifurcating and further evaluating the many different dynamics of family and non-family disputes. Furthermore, it points to the high probability of court-based dispute resolution having less

resonance and efficacy in areas with robust non-court-based dispute resolution alternatives catering particularly to disputes within *Khandan* and *Biradari*, as well as, possibly, the non-family/non-clan disputes. Political grouping (*dharra*) did not emerge as a significant factor in the survey, although it is also likely to be much more significant in other areas along the rural–urban spectrum. The possible differences between the triggers and dynamics of family/clan- and non-family/non-clan-related disputes and related preference/lack thereof for courts as a forum thus emerge as important areas of further inquiry.

To further understand the underlying causes and social milieu of disputes in the Lahore District, the respondents were asked whether they felt that any background factors contributed to the emergence and perpetuation of their disputes. They were allowed multiple responses. Several contextual and contributory factors emerged, either from direct responses or from the general narratives of the respondents. They are very important for appreciating the nature and stimulants for recurrent disputes and for visualizing remedial measures. As many as 180 respondents reported that a problematic law caused or contributed to their dispute. A total of 119 respondents highlighted the existing apparatus of formal justice and its mechanisms for dispute resolution as further aggravating or perpetuating their disputes. Another 79 respondents pinpointed the application and administration of land law in the country as a problem. The number of respondents who felt that their gender was a causal factor totaled 66. A further 30 respondents complained about the lack of formal regulation of certain areas of social existence, and an almost equal number (29 respondents) highlighted *Biradari* politics as a contributory factor to their disputes. Unfair land distribution patterns were highlighted by 18 respondents. The same number of respondents also pointed out additional social, cultural, political, economic, ethnic, linguistic, and regional contributory factors. Commercial rivalries and differences (19) and conflict between local customs/practices and a law or regulation (12) also figured in these responses, while some others mentioned social class (8) and political rivalry (4). What emerges from this feedback are various levels of possible disconnect between law and society as well as the at times over-presence and at other times partial or complete absence of law. Many respondents blame the complexity, ambiguity, and/or legal lacunae of certain laws as the sources of genuine confusion, attrition, and contention. They also declare such laws as contributory factors for frivolous or coercive litigation. Once again, one can visualize that the response pattern may be quite different in other

districts of the Punjab with diverse societal organizational patterns, cultural variations, and differences in political-economy.

The palpable linkage between civil disputes and the commission of crime was another important finding of the Lahore Survey. According to one interviewee, "Civil cases become the root causes for criminal cases as people don't get justice in civil cases."[32] He knew what he was talking about. The results reveal that as many as almost one-quarter (22.5 percent) of the survey respondents reported being victims of crimes that they claimed were related to their civil disputes. Although many of these respondents were reluctant to talk further about these crimes, those willing to speak most frequently reported physical injury, harassment, theft and/or damage to property, and harassment by the police. In a few instances, they reported even more serious crimes such as abduction, murder of kin, sexual harassment, and rape. The opposing party, their friends and relatives, as well as their agents, servants, and supporters, were most frequently identified as the perpetrators of these crimes. As to the outcome of and follow-up on the criminal act, the most frequent response of those who had reported a crime was that the FIR (First Information Report – the formal complaint to the police in order to invoke a criminal investigation) was not registered with the police. This was due to a wide range of reported reasons, from reluctance on the part of the respondent him- or herself to start a criminal investigation, to coercion by the opponent to dissuade the respondent from such action, to non-cooperation of the police due to the pressure or influence exercised by the opponent. It further emerged that very few of the reported crimes had actually triggered a police investigation and successfully undergone all the necessary legal stages and formalities to lead to a criminal trial. This feedback gives an important insight into the nature and magnitude of intimidation faced by some of the civil disputants while contesting their civil cases. For many civil disputants, therefore, their ongoing unmolested pursuit of justice in the civil courts is ultimately dependent upon their ability to stave off opponents who may be quite willing to employ duress and violence. Thus, this pursuit is directly linked to their capacity for accessing the investigative services of the police as well as the general levels of protection of life and property provided by the state. At the same time, it is also worth further exploring whether the correlation of crime with seemingly interminable civil

[32] Interview with Respondent No. 272, January 4, 2011.

litigation may often be the outcome of frustrated parties resorting to violence in order to force a compromise, or otherwise reach a conclusion or closure and thus escape the slow and excruciating grind of the courts.

Justice delayed

That debilitating delay is a resilient characteristic of litigation in Pakistan was resoundingly clear in respondent feedback in the Lahore Survey. When asked specifically about the duration of litigation, the responses revealed that a fair share of the legal cases in the survey sample had been running for a fairly long time.[33] According to one respondent, "Let me give you an idea of how long my case has been running. As a child, I used to accompany my grandfather when he came to the court to pursue this case. I am a grown man now and the case is still undecided after over 30 years of litigation."[34] Another respondent said, "My case is 28 years old and I am over 70. There have been several court orders in my favor and I have also employed up to fifteen different lawyers but I am still stuck in court. I want to resolve this case before I die but my opponents don't want this. I am sure they are waiting for me to die."[35] A female respondent lamented, "For 20 years have I been waiting for justice. Judges and lawyers ensure that the case does not come to a conclusion. I am very tired but I have no other place to go. This legal system is a complete failure."[36] Yet another respondent complained, "My father and brother died pursuing this case. If I die tomorrow there will be no one to pursue it. If I carry a gun for my protection I will be branded as a terrorist. And if I don't I feel unsafe."[37] According to another interviewee, "The judge in my case took two-and-a-half years to write his first order. This is even though I had requested him in court to decide the matter either way, so that I could escape this ordeal."[38]

Additional responses from those who had been embroiled in litigation for fairly extended periods of time communicate the bitterness of their

[33] Although there were quite a few recently initiated legal cases, over half the cases (just over 52 percent) had been running for over 2 years, almost one-third of the cases (29.5 percent) had been running for over 5 years, and 13 percent of the cases had been running for over 10 years.
[34] Interview with Respondent No. 72, December 21, 2010.
[35] Interview with Respondent No. 104, December 22, 2010.
[36] Interview with Respondent No. 133, December 23, 2010.
[37] Interview with Respondent No. 311, January 6, 2011.
[38] Interview with Respondent No. 221, January 3, 2011.

experience and the depth of their despair. According to one such respondent, "My case has been running for 7 years and I have not progressed from square one, which leads me to think that either the judges or the lawyers are corrupt. I know this for a fact as one of my previous lawyers was bought over by the other party."[39] An old man broke down during the interview and had to be consoled before carrying on – he was not the only one who started crying during the Lahore Survey. According to him, "I am 80 years old and my brother died fighting this land case. This very case consumed and killed him. We have had extensive litigation on this piece of land and won at many junctures. Many Local Commissions appointed by the High Court decided in our favor but the case remains unresolved even so many years after it was initiated."[40] Another respondent echoed him, "I know that like my father I too will die pursuing this case. And then my son will have to take it over like I did."[41] According to yet another respondent, "I settled down on this land after the 1971 war. The politicians of the time said that the land that one physically possessed belonged to him and we believed them. I want to get this land registered in my name so that my children don't face any difficulties in future. Some of us were approached and offered such registration subject to payment of bribes. However, I declined and chose to come to the court instead, as I didn't want to take any short cuts. I had two additional cases pending against other claimants to the title of this land that I eventually won. However, as a result I have spent away my youth in the courts."[42]

Other respondents pointed out various legal lacunae as the source of opportunities for delaying the adjudication of cases. According to one such respondent, "There are far too many lacunae in the current laws, which means that either party can misuse the same and elongate the court process. The operators of the legal system, on the other hand, constantly expect 'speed money' to push the process along. It is very difficult to get justice."[43] Some of the respondents pointed out what they thought were unnecessary and time-wasting legal requirements mandating that certain non-contentious issues also be brought to the court for resolution. One respondent protested, "Any amendments or changes in

[39] Interview with Respondent No. 115, December 22, 2010.
[40] Interview with Respondent No. 118, December 22, 2010.
[41] Interview with Respondent No. 210, January 3, 2011.
[42] Interview with Respondent No. 344, January 6, 2011.
[43] Interview with Respondent No. 201, December 24, 2010.

one's legal records or documentation should not involve a court process as it wastes a lot of time."[44] Another respondent echoed this view, "There should really be no need to come to court for non-contentious matters and thus having to face the never-ending court processes. My family has withered away while pursuing this matter."[45]

The picture is equally stark when one moves from the qualitative feedback on delays in courts to the relevant overall statistics. To a general question about the time usually taken by courts to decide cases, an overwhelming majority of the respondents (81 percent) reported "a lot of delay" in the court process. Another 13 percent reported "a fair bit of delay." Thus, 94 percent of all the interviewed respondents described the court processes as debilitated by delay. Asked specifically about their levels of satisfaction with the pace at which their cases were proceeding, just over three-quarters (76 percent) of the overall respondents said that they were "dissatisfied" or "deeply dissatisfied" – of these, 42 percent were acutely unhappy as they emphasized that they were "deeply dissatisfied."[46] On the other hand, a mere 16.5 percent of the overall respondents reported that they were "satisfied" (14 percent) or "highly satisfied" (only 2.5 percent) with the pace at which their legal cases were proceeding. Given this dismal state of affairs, it is not surprising that on being asked when they expected a final decision in their cases, a large majority of the respondents (67.5 percent) said that they could not predict when the final court verdict would arrive.

True appreciation of the quantum of physical and emotional effort involved on the part of a typical litigating party in keeping up with extended litigation can be gained from the following respondent feedback. Over three-quarters (78 percent) of the respondents reported that they came to every court hearing. When asked about the number of court hearings that had taken place in their cases, almost half of the respondents (48 percent) actually said that there had been so many hearings that they had simply lost count.[47] To gauge the overall time and effort invested by the litigants in pursuing their cases, they were also asked about the total number of trips they had taken to the courts since the

[44] Interview with Respondent No. 123, January 23, 2011.
[45] Interview with Respondent No. 208, January 3, 2011.
[46] The dissatisfaction ran more or less uniformly across gender, education, and monthly household income classifications.
[47] Another 13.5 percent of the respondents said that over fifteen hearings had taken place, but this category included a vast range of numbers between sixteen to upwards of forty hearings.

initiation of their cases. (Litigants come to court not just to attend court hearings, but also to follow-up with lawyers or court staff, or for miscellaneous other case-related requirements and tasks. Furthermore, there can also be many wasted trips as scheduled court hearings are frequently adjourned for a wide variety of reasons.)[48] An aggregate of 12.5 percent of the respondents reported between over twenty and over forty court trips. However, quite disturbingly, once again almost half of the overall respondents (48.5 percent) reported that they had come to court so many times since the inception of their legal cases that they had simply lost count. What is evident from this feedback is that for the majority of respondents a civil suit is synonymous with a costly, exhausting, and frustrating wait. What is also apparent is that all the reform initiatives of the past decade with their singular focus on delay reduction (as shall be further discussed in the following chapters) seem to have had negligible positive impact on the Lahore District Courts – the main courts, it must be emphasized once again, which cater to the civil adjudication needs of one of the most socio-economically vibrant districts of the province, situated in the heart of its capital city, and at a walking distance from the powerful and resourceful apex court of the Punjab. So it is not difficult to imagine how things fare in less affluent and more far-flung areas of the province.

Respondent perceptions of background legal rules and abuse of legal process

While expeditiousness of dispute resolution surely did not emerge as a forte of the formal court system, the Lahore Survey also explored citizen perceptions about the quality of court-based justice – its neutrality, notions of equity, procedural and substantive fairness, and the merit and acceptability of the distributive consequences of its legal pronouncements. While pursuing these lines of inquiry, one remained cognizant of the role of formal courts as the terrain for contestation and bargaining over varying and at times conflicting aspirations of different sections of society. In other words, these lines of inquiry embraced Robert Hale's important insight that (as Duncan Kennedy summarizes it), "the rules of

[48] According to most of the respondents, court hearings occur fairly frequently, with 35 percent of the respondents saying every 15 days, and 31.5 percent of the respondents saying that 1 month is the average gap between hearings. However, just over 26 percent of the respondents also said that the gap between court hearings was unpredictable.

property, contract, and tort law (along with the criminal law rules that reinforce them in some cases) are 'rules of the game of economic struggle.'"[49] It also took into account that these rules "differentially and asymmetrically empower groups bargaining over the fruits of cooperation in production."[50] Legal realists like Hale reveal how the state uses force to ensure obedience to the rules of the game of bargaining over a joint product. Thus, the state is, in fact, the author of the distribution, even though distribution appears to be determined solely by "voluntary agreement" of the parties. Hale warns against our taking for granted the background legal rules for a given economic system. He deems it a "voluntaristic" fallacy to think that a laissez-faire system does not have coercive restrictions.[51]

The Lahore Survey sought to find out how the randomly selected litigants perceived the "distribution" inherited and/or authored by the Pakistani state and the "background legal rules" that it had retained and left unchanged and/or put in place for the preservation of the same. It further probed how they felt about the officially dictated "rules of the game of bargaining" in case they believed that the officially mandated "distribution" and the "background legal rules" put them at an unfair advantage. What emerged was an uninhibited critique pointing out various differential and asymmetric distributive consequences of Pakistan's laws and its legal system, and their perceived complexity and unintelligibility at various levels to the ordinary citizen. There was equally uninhibited castigation of the very "background legal rules." According to one respondent, "The laws are a complex and confusing mix of English and Islamic laws. They need to be one or the other so that they are more intelligible."[52] Some of the respondents attributed the legal system's perceived dysfunctionality to its archaic nature: "How can you expect anything from a crumbling, outdated legal system which is a remnant of the British? Even if it worked before, it just does not work anymore. The property being disputed in my case is worth one hundred and twenty thousand rupees and so far I have spent a hundred thousand

[49] D. Kennedy, "The Stakes of Law, Or Hale and Foucault!" in *Sexy Dressing etc. Essays on the Power and Politics of Cultural Identity* (Cambridge, MA: Harvard University Press, 1993), p. 83.

[50] Kennedy, "The Stakes of Law," p. 83.

[51] R. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Pol. Sci. Q.* 38 (1923), 470, 470–1, 481.

[52] Interview with Respondent No. 173, December 24, 2010.

rupees on litigation, with no clear outcome in sight."[53] Those with a more sarcastic bent described their predicament with a bitter sense of humor: "The English set up these *Deewani Adalatain* (civil courts) in our country so that our people go *Deewana* (mad)."[54] Others also lamented the multiple and at times conflicting sources of Pakistani legal rules, but had clear preferences for the future. According to one of them, "I cannot understand why we have the law of the British. Should we not have our own laws?"[55] Still others were even more specific: "The British laws are outdated. I really believe that Islamic laws should be introduced instead."[56]

Many respondents emphasized that the lack of clear, evolving, and effective laws and regulations had caused their legal troubles and had led to their discriminatory treatment. One such respondent claimed that archaic laws and the lack of regulation in important areas of property rights were significant contributors to interminable litigation as well as frequent injustice. According to him, "My case has been carrying on since 1979, and that is purely because government regulations on the change of land use are archaic, confusing, and discriminatory. Many people in my locality accepted the government's payments in lieu of vacating their houses in order to create space for a government project, and yet they continue to illegally occupy the same. I on the other hand refused to take this payment and decided to legally assert my right to my house. The result is that I am the only one facing forced eviction."[57] Some pointed out what they felt was a highly outdated procedure, which promoted uncertainty of outcome: "With the current legal procedures in place no one can predict when a case will be decided."[58] Others attributed differential treatment under the law to economic class: "The law is different for the resourceful and the poor. The rich get legal protection; the poor are made culprits."[59] According to another

[53] Interview with Respondent No. 398, January 7, 2011.
[54] Interview with Respondent No. 234, January 3, 2011. The word "*deewana*" in Urdu means mentally unhinged. It is often used in Urdu poetry while describing unrequited love and the toils and travails of the doomed lover seeking the beloved, which ultimately leads him or her to madness. A more prosaic term is "*Deewan*," which was the Mughal title for the minister of finance and civil and commercial matters – hence the term "*deewani adalatain*" for civil courts – a term borrowed by the British from their Mughal predecessors.
[55] Interview with Respondent No. 364, January 6, 2011.
[56] Interview with Respondent No. 198, December 24, 2010.
[57] Interview with Respondent No. 119, December 22, 2010.
[58] Interview with Respondent No. 213, January 3, 2011.
[59] Interview with Respondent No. 212, January 3, 2011.

respondent, "The poor simply don't stand a chance under this legal system."[60] Yet another respondent was of the view, "The law has no remedies for the under privileged. Might is right!"[61] Another interviewee complained, "The current laws simply force one to sell oneself."[62] For some the solution, therefore, had to be drastic: "This legal system is utterly obsolete and needs complete overhauling."[63] Others spoke of their despair: "The laws are completely flawed and there is no hope that they will ever be improved."[64]

In terms of overall statistics, upon being asked if they felt or agreed with the statement that the Pakistani laws were outdated and did not capture ground realities and peoples' actual problems, the responses were fairly critical. As a matter of fact, only 14 percent of the overall respondents said that they disagreed with this statement. On the other hand, more than half (56 percent) of the respondents readily agreed that the Pakistani laws were outdated and that they did not capture ground realities and people's actual problems. Another 8.5 percent of the respondents expressed partial agreement with this statement. The remaining 21.5 percent said that their understanding of the Pakistani legal system and laws was too inadequate for them to be able to comment.[65]

[60] Interview with Respondent No. 141, December 23, 2010.
[61] Interview with Respondent No. 143, December 23, 2010.
[62] Interview with Respondent No. 272, January 4, 2011.
[63] Interview with Respondent No. 178, December 24, 2010.
[64] Interview with Respondent No. 167, December 24, 2010.
[65] A somewhat smaller proportion (55.5 percent) of the uneducated and less educated respondents (with education less than or equal to secondary school level) fully or partially agreed with this statement, as compared with respondents with higher than secondary school level education (69.5 percent). This is explicable in part by greater levels of uncertainty among the uneducated and less educated respondents as to how to respond to this question. As many as 35 percent of the uneducated and less educated respondents expressed their inability to answer this question, as compared to only 14 percent of those with a higher than secondary school level of education. Greater levels of education thus seem to translate into greater awareness of the laws as well as their gaps and inadequacies. In terms of the monthly household income of the respondents, as many as 61 percent of the respondents in the two lowest income categories fully or partially agreed with this statement. However, the discontent is even higher among the higher income respondents. Just over 70 percent of these respondents agreed or partially agreed with the statement. But then it needs to be noted that 27.5 percent of the respondents in the two lowest income categories expressed an inability to answer this question, as compared to 11.5 percent of the respondents in the higher income categories. At the same time, only 11.5 percent of the respondents in the two lowest income categories actually disagreed with this statement, as compared with 18.5 percent of the respondents in the higher income categories.

The respondents were also asked about their perceptions regarding the neutrality of Pakistani laws as well as their capacity to furnish adequate rights and remedies. Specifically, they were probed as to whether they felt that these laws were biased against them, unjust to them, and/or provided them with inadequate rights and remedies. The majority felt that they were getting a raw deal. As many as 54 percent of the respondents were fully (46.5 percent) or partially (7.5 percent) of the view that the Pakistani laws were biased, unjust, and/or inadequate. Another 20.5 percent of the respondents said that they could not comment or did not know, and only 25.5 percent said that they did not agree with the assertion that the laws were biased, unjust, and/or inadequate.[66]

Uneven playing fields

While it captured the rampant dismay with the inefficiencies of the formal legal system and widespread concerns about its neutrality and receptivity to contextual realities and peoples' real problems, the Lahore Survey also brought forth another very important contextual reality. It highlighted the fact that when people come to court, they do not leave behind their socio-economic vulnerabilities and disadvantages. One can never lose sight of the fact that these inequities and constraints – in terms of education, income, and employment opportunity distribution patterns – can be quite pronounced in highly skewed societies like Pakistan. Furthermore, the Lahore Survey provided evidence that even though

[66] Of the respondents who were illiterate or had less than or equivalent to a secondary school education, almost half (47.5 percent) fully or partially agreed with the statement. As compared to this, around 57.5 percent of the respondents in the higher educational categories agreed with this statement. However, as many as 32.5 percent of the respondents who were illiterate or had a less than or equivalent to a secondary school education felt unable to comment, as compared with only 13.5 percent of the respondents in the higher educational categories who felt similarly incapacitated to respond. Conversely, only 20 percent of the respondents who were illiterate or had less than or equivalent to a secondary school education disagreed with this statement, as compared with almost 29 percent of those in higher education categories. In terms of the respondents' household income, over half of the respondents (52 percent) in the two lowest income categories fully or partially agreed with the statement. Another 25.5 percent felt that they were unable to comment or did not know. As compared to this, 57.5 percent of the respondents in the higher income categories fully or somewhat agreed with the statement. However, only 11.5 percent of the respondents in the higher income categories felt that they did not know the answer to this question or otherwise declined to respond.

the formal legal system may project itself as a level playing field, such levelness is largely an illusion to people who are disadvantageously placed on the social and economic ladders. Quite apart from it inherently being a rather lopsided arena, in certain situations the formal legal system may actually be shown to be very amenable to coercive misuse by the more powerful. Equally importantly, the formal legal system may often obtusely adhere to and obstinately insist upon processes and procedures that actually exacerbate the weaknesses of the already vulnerable.

Another important finding of the survey is that coercion and pressure tactics from opponents may be continuing challenges for certain litigants as they approach the court. A very large proportion of the respondents (48 percent) said that they had encountered such tactics before or during litigation. A somewhat greater proportion of the respondents who were uneducated or had an education less than or up to secondary school level reported coercion (55.5 percent), as compared to those with an education higher than secondary school level (44 percent).[67] At the same time, a much greater proportion of the respondents who lived in villages reported coercion (65.5 percent), as compared to those from small towns (42.5 percent), suburbs (50 percent), and the central city (46 percent). Additionally, a much higher proportion of the respondents who fell in the two lowest income categories reported coercion (54 percent), as compared to the respondents falling in all the remaining higher income categories (38 percent).[68] Thus, monthly household income emerged as a significant variable when it came to vulnerability to coercion and pressure tactics from legal opponents. When asked about the nature of coercion and allowed to give multiple responses if applicable, "threat of violence" was the most common response, followed by "actual violence," "harassment," "threat of destroying business or personal reputation," and "threat of ruination through extended litigation."

[67] This gap is actually even larger if one considers that there were quite a few more respondents in the latter higher education categories. In other words, whereas 159 respondents fell in the no education or lower education categories, 281 respondents fell in the higher education categories.

[68] This was both due to the higher proportion of the low income respondents reporting coercion as a percentage of their overall number, and also because the overall number of respondents was higher in the first two monthly household income categories (276) as compared to respondents in the remaining high income categories (164). Another way of looking at this is that the respondents reporting coercion who fell in the two lowest income categories comprised almost 71 percent of the overall number of respondents who reported coercion and pressure tactics from legal opponents.

In a social milieu characterized by various deep levels of disparity, the actual and/or perceived differences of litigation experience and financial and social resourcefulness between court contestants are important factors contributing to the actual or perceived levelness of the playing field. Accordingly, the survey respondents were asked various questions about their perceptions of the experience and resourcefulness of their legal opponents. Furthermore, it was inquired whether they regarded the court arena as providing equal access and a level playing field, given possible variations in the respective capacity, experience, resources, and networks of their opponents and themselves. In response to the first question, a majority of the respondents (65 percent) said that, compared to them, their opponents were "highly resourceful" or "fairly resourceful." One possible explanation for this is the general human tendency to exaggerate the relative resourcefulness of one's opponent in order to more persuasively plead one's weakness and consequent exploitation at the hands of the opponent, so as to gain sympathy and support. However, there is another possible explanation. Since the respondents were randomly selected, it is also plausible that a greater proportion of the relatively weak and less resourceful litigants were likely to be found frequenting the lowest levels of the court system on any given day, as compared to the more resourceful ones. One can imagine the latter as being relatively unconcerned or unencumbered by ongoing litigation and thus not feeling obligated to make regular personal appearances at the court. One can also assume a greater level of confident reliance on their part on the services of better paid and more effective lawyers in order to effectively guard their interests in their absence.[69]

[69] This can be verified by following up on background information about the opponents through a review of the actual legal documents and/or interviews with the opponents and/or their lawyers. The Lahore Survey did not seek to undertake this exercise, but the survey data does present independent evidence that many of the respondents may not have been exaggerating their opponents' greater resourcefulness. This is because, as we have seen, a sizable majority of the respondents belonged to the two lowest income categories and were thus likely to be relatively weak in resourcefulness as compared to their opponents in terms of income and consequent economic and social resourcefulness. There is always the possibility that their opponents actually belonged to the same income brackets. As a practical difficulty, very few of the respondents, however, actually pointed out the presence of their opponents in court in order for them to be interviewed so as to verify their relative resourcefulness. There are persuasive reasons, therefore, to take the feedback of the respondents on face value. Furthermore, in response to a question about the occupation of their legal opponents, the most prominent response was private business (18.5 percent), followed by landowners (8 percent), government employees (8 percent), land mafia (7 percent), and private company employees (6 percent).

The Lahore Survey also attempted to gauge the level of litigiousness of the respondents as well as how deeply embroiled they were in legal contestations with their opponents. Thus, they were asked if they were engaged in any other/additional litigation with their legal opponents. Almost one-quarter (23 percent) of the overall respondents responded in the affirmative, thus indicating that a fair proportion of the litigants were locked in multiple legal battles. The respondents were also asked about any past litigation with their legal opponents in order to gauge possible linkages between their current disputes with any previous contestations. As many as 16 percent of the respondents replied in the affirmative. The respondents were further asked if they knew whether their legal opponents were also currently engaged in any litigation with other people. This was both to gauge their perception/experience of their opponents as more experienced and skillful litigators, as well as individuals with greater propensity to go to court and hence less amenability for negotiation and compromise. Almost one-third (32.5 percent) of respondents said that their opponents were also engaged in other ongoing litigation. Exactly the same proportion said that they were not. The rest of the 35 percent conceded that they did not know. In the same vein, the respondents were asked whether their legal opponents had any past experience of successful litigation. More than one-fifth (21.5 percent) of them thought that they did, whereas almost one-third (33 percent) thought that they did not. However, almost half (45.5 percent) of the overall respondents were unsure, as they did not have sufficient information to comment.

The Lahore Survey further probed how battle hardy the respondents were by asking them about any past litigation experience, in order to compare this with their reported perception of their opponents' litigation experience. Almost three-quarters (74.5 percent) of the respondents

Therefore, some disparity in terms of occupation does emerge, as the reported occupations of legal opponents can be seen to be relatively more privileged and resourceful when compared with the occupations reported by the respondents for themselves. For instance, housewives, retired government or private company employees, and craftsmen do not make an appearance in the top responses to the question about the opponents' professions. They do so, however, in response to the question about the respondents' own occupations. As a matter of fact, taken together these three relatively less resourceful occupation categories accounted for the occupation of 27.5 percent of the respondents; but they only accounted for 7.5 percent of the reported occupations of the legal opponents. In addition, it is interesting to note that the categories "criminal" and "land mafia" are used to describe the occupation of an aggregate of over 11 percent of the legal opponents.

reported an absence of any litigation experience. As to those with prior litigation experience, certain clear trends emerged – city-dwellers, the more educated, and the more affluent respondents reported greater litigation experience as compared to non-city dwellers, the less educated, and the less affluent.[70] Respondents reporting past litigation experience (113) were also asked whether they found such experience to be advantageous in their current legal battles. Of this number, 86 replied in the affirmative. However, such seasoned campaigners, who also found prior experience to be advantageous in their current litigation, only constituted 19.5 percent of the overall sample – the rest of the sample population did not report any such experiential advantage. What is important to note here is that of the almost three-quarters of the overall sample of respondents who had said that they did not have any past litigation experience (74.5 percent), many felt that such lack of experience was an impediment or handicap. As many as 39.5 percent of the overall sample deemed it a handicap and another 10.5 percent thought it was "somewhat" of a handicap. Another 8.5 percent said they could not be sure and 4 percent did not respond. All of these categories of responses thus add up to 62.5 percent of the overall sample. Only 12 percent of the overall sample did not think that lack of past litigation experience posed any handicap.[71] The respondents were also asked whether they were assisted by a more knowledgeable person in their case proceedings, other than their legal counsels. Almost three-quarters of the respondents (72 percent) responded in the negative; together with another 6.5 percent who said they only had occasional access to such assistance. The respondents who had access to knowledgeable assistance were asked about the identity of their assistors. Family members (69), friends (32), and other relatives (19) were the most common responses. The upshot of all this analysis is that with three-quarters of all respondents reporting no past litigation

[70] 29.5 percent of respondents from the central city, 22.5 percent of those from the suburbs, 11.5 percent of those from small towns, and 19.5 percent of those from the villages reported past litigation experience. 35.5 percent of the respondents who reported prior litigation experience fell in the educational categories of uneducated or educated below or equivalent to secondary school level, as compared to the 64.5 percent that fell in the higher education categories. Furthermore, while 77.5 percent of the respondents in the two lowest income categories said that they had no prior litigation experience, 69 percent of the respondents in the remaining higher income categories acknowledged that they did. Also, 65.5 percent of all respondents who said they had no prior litigation experience fell in the two lowest income categories.

[71] These respondents did not have any past litigation experience, but were confident that they were not disadvantaged due to lack of experience.

experience, nor any access to knowledgeable assistance or a support system, what emerges is a sizable segment of the litigating population that feels far more uncertain and apprehensive while facing the formal court system as compared with the small minority of those with experience, advice, and support. The playing field is surely far from level in more ways than one.

The coercive potential of law

The above-mentioned apprehensions are bound to escalate if the respondents also harbor a lack of faith in the capacity of the formal legal system to deter self-serving abuse of the court process by resourceful opponents. According to the Lahore Survey, quite a few respondents expressed their conviction that the long court process delays were not just accidental, nor an unpleasant but necessary aspect of litigation, nor an inconsequential happenstance. Instead, they frequently pointed out frivolous or mischievous litigation as an effective strategy of choice by legal opponents. One interviewee divulged, "My opponents have a frivolous case. They first sought a stay order from the court to put pressure on us and only then approached us to propose that we could discuss the matter out of court. In my view, 80% of the cases in courts are frivolous."[72] Another respondent was of the view, "It is the people with false and frivolous cases who mostly go to court."[73] Yet another respondent had the following to say, "Everything can be resolved out of court. Only fraudsters drag any disputes to the court so that they can misuse the court system."[74] One of the respondents recommended, "If the government wants to curtail frivolous litigation over property then the courts ought to require the plaintiffs to submit an amount equivalent to the contested property as a guarantee before the start of litigation. Otherwise people will continue to initiate frivolous litigation over property."[75] Not everyone, however, was lamenting; some chose to gloat. One respondent openly admitted, "I am using the court proceedings to merely pressurize my opponents."[76] Another interviewee shared with unabashed satisfaction, "I am using the court process to delay the resolution of the matter so

[72] Interview with Respondent No. 102, December 22, 2010.
[73] Interview with Respondent No. 140, January 23, 2011.
[74] Interview with Respondent No. 205, December 24, 2010.
[75] Interview with Respondent No. 96, December 21, 2010.
[76] Interview with Respondent No. 196, December 24, 2010.

that my opponent can see the light of the day. Once I drag him long enough through the courts he will settle the dispute with me."[77]

The overall statistics confirm widespread belief in the everyday coercive use of courts and legal processes. As many as 73.5 percent of the overall respondents categorically stated that they believed that the delays in courts benefited certain parties and were thus created and perpetuated by the same.[78] Another 3.5 percent said that that may be the case "sometimes" and 5.5 percent said that "perhaps that was the case." Crucially, only around 6 percent of the overall respondents disagreed with this view. As a follow-up and to garner further specificity, the respondents were also asked if they felt that the delays in courts were specifically used by some contesting parties for gaining leverage, in order to pressurize their opponents into settling the matter out of court. A vast proportion of the overall respondents replied in the affirmative (69 percent).[79] Still others said that that may be the case "sometimes" (4.5 percent), or that "perhaps that was the case" (7 percent). Only 7.5 percent of the overall respondents disagreed with this contention.

Responses to other survey questions also revealed serious respondent concerns about the routine self-serving manipulation of the formal legal system by resourceful contestants and their agents. Among the main reasons quoted for long delays in court proceedings and judicial decisions (multiple responses were allowed), the most common response was "delaying tactics by opponent" (206), followed by "adjournments by opposing lawyer" (132). Furthermore, "judicial ineptitude to decide cases" (121) and "overload of cases in courts" (115) emerged as the third and

[77] Interview with Respondent No. 139, December 23, 2010.

[78] 75.5 percent of respondents with education higher than secondary school level and 70 percent of respondents who were uneducated or had education below or equivalent to secondary school agreed with this view. Roughly three-quarters (71 percent) of both the less affluent respondents in the two lowest income categories and the more affluent respondents (77.5 percent) were of this view. Thus, a clear perception of the strategic and self-advantageous creation and use of court delays transcended the educational and income boundaries. The remainder opted for responses such as "sometimes," "perhaps," "don't know," or "don't agree."

[79] 71 percent of the more educated respondents (higher than secondary school education) and 65 percent of the uneducated or less educated respondents (education less than or equivalent to secondary school) said that court delay was used as leverage to pressure opponents. 66.5 percent of the respondents in the two lowest income categories and 72.5 percent of the more affluent respondents were of the same view. A slightly greater proportion of the respondents from the central city were of this view (71 percent), as compared to respondents from the suburbs (66.5 percent), small towns (69 percent), and villages (57.5 percent).

fourth most frequent responses. "Judicial corruption" was the fifth most frequent response (101). In addition, respondents highlighted various other perceived shortcomings of the formal adjudicative system, such as "unavailability of parties or witnesses to appear in court" (87), "unavailability and adjournments by interviewees' lawyer" (81), "complexity of laws and resulting disputes" (77), "frivolous and/or mischievous litigation clogging courts" (68), "ineffectiveness of interviewee's lawyer to push the case along" (53), and "reluctance on part of judge to decide the case" (49).

The "cultural hegemony" of formal law

One particular day during the conduct of the Lahore Survey, the author observed an elderly lady stoically standing in the exposed and freezing corridor. As her case was called, her lawyer briefly conferred with her and then hurried inside. She stayed put even though the courtroom promised some warmth. It was a curious sight. She did not seem shy; the court was not over-crowded; and her matter was not potentially awkward as one found out. She told the author that her lawyer always instructed her to stay outside. "In any case, I can't make head or tail of what happens inside. They use strange English terms. Even the Urdu they speak is very difficult." The author opined that it must be very hard for her to assess the progress of her case and her lawyer's performance. She said that he had become upset on occasions when she had insisted on observing the proceedings. Her deaf and mute vigil had been going on for some years.

English is the language of the laws, regulations, and legal judgments in Pakistan. A few laws are published in official or unofficial Urdu translations, but their availability is by no means regular, and the translations are neither comprehensive nor reliable. New amendments to the law are also not translated into Urdu in any systematic manner or on any consistent basis. Thus, facility with the English language is a vital prerequisite for Pakistanis who want to comprehend their laws. In a context where English is the official language of governmental business, but where it is not the national language or a native language, or for that matter a language which the vast majority of the population gets the opportunity to even learn at a basic level, the issue of language understandably adduced some strong reactions in the Lahore Survey. According to one respondent, "I just don't understand why our laws are in English and that too in old-fashioned English which we cannot understand."[80]

[80] Interview with Respondent No. 247, January 3, 2011.

In order to further explore the possible obstacles created by this language apartheid, several questions were put to the respondents to gauge their overall level of familiarity and facility with the Pakistani legal system. They were asked about the language of the laws and regulations that governed their cases. As it turned out, only 33.5 percent of the respondents said that the applicable laws and regulations were in English. One can appreciate the confusion of 36.5 percent of the respondents who said that the language was a "mix of English and Urdu," since a fair amount of the legal paperwork, especially in the trial courts, is in Urdu. Hence, they can be excused for thinking of both languages when they visualize Pakistani laws and regulations. However, the 18 percent who said "Urdu" in response to this question were obviously off the mark. Furthermore, another 12 percent simply did not know the answer to this question. Taken together, these 30 percent or almost one-third of the respondents had clearly never even seen the laws and regulations governing their immediate cases and hence could not be expected to be familiar with the same, let alone be fully cognizant of their rights and obligations thereunder. Not surprisingly, the uneducated/less educated as well as the less affluent respondents were proportionately much less familiar with the language of the laws and regulations that governed their cases as compared to the more educated and affluent respondents.[81]

The respondents were also asked about the language of court documents, legal contracts, deeds, etc. Once again, a variable set of responses emerged. In actual practice, the court documents, legal contracts, deeds, etc. in circulation in Pakistani trial courts are in English as well as Urdu, and yet collectively 51 percent of the respondents either said "English" or "Urdu," and 6.5 percent actually conceded that they did not know. The respondents were further asked about the language in which court proceedings were conducted. A variety of responses convey highly differential experiences due both to the actual diversity of courtroom practices as well as disparate levels of litigant comprehension and consequent perceptions of court practices.[82]

[81] In terms of education, the proportion of those expressing unfamiliarity are 43 percent of the former category as compared to 22.5 percent of the latter category. In terms of monthly household income, the proportion of those expressing unfamiliarity are 35 percent of the former category as compared to 21.5 percent of the latter category.

[82] The detailed responses are as follows: 6 percent said "English," 31 percent said "Urdu," 2.5 percent said "Punjabi," 38.5 percent said "a mix of English and Urdu," 10 percent said "a mix of English, Urdu, and Punjabi," 6.5 percent said "a mix of Urdu and Punjabi," and 5.5 percent said that they did not know. The survey also revealed differential experiences

After these questions the respondents were directly probed as to whether they understood English. As many as 69 percent of the overall respondents admitted that they either "didn't understand English" (39.5 percent) or that they only "understood it somewhat" (29.5 percent) – thus revealing a fundamental impediment to comprehending, accessing, and utilizing the Pakistani legal and court system for seeking justice. The uneducated respondents and those with educational levels less than or at the most equivalent to secondary school level, as well as the less affluent respondents, unsurprisingly emerged with proportionately much lower levels of familiarity with English as compared with the more educated and more affluent respondents. As a matter of fact, none of the respondents in the uneducated/less educated categories comprehended English.[83]

and perceptions based on the respondents' monthly household income. The majority of the respondents who reported that they were not aware of the language of the court proceedings fell in the two lowest income categories (78.5 percent), which shows that either they did not comprehend actual court proceedings or that they were completely reliant on their lawyers and possibly did not actually attend the court proceedings under instructions from their lawyers. Like the experience of the lady described at the start of this section, in all probability they were also made to wait outside the courtrooms while their lawyers appeared in court. Quite a few of such respondents were actually observed standing outside the courtrooms while their lawyers either awaited their turns to argue their cases or were actually arguing the cases inside the courtrooms. These respondents also reported that they were always told by their lawyers to wait outside the courtroom during the hearings.

[83] In terms of education, over 83 percent of the uneducated respondents and those with educational levels less than or equivalent to secondary school reported that they did not understand English at all. If one adds to these those who said that they only understood the language "somewhat," the proportion of those who either did not understand English or had a fairly limited understanding goes up to almost 99 percent of all the respondents in these categories. Furthermore, bearing in mind that the laws and regulations are written in a technical and even archaic language (often using Latin terms) and also the highly variable and inadequate quality of schooling available to most Pakistani citizens, it would be very unrealistic to expect anyone with even a secondary school education to have any great success with reading and understanding laws in English. Thus, the feedback of the 25 respondents in the uneducated and lower educational categories who reported that they were "somewhat" familiar with English has to be approached with a fair degree of skepticism. It is quite likely that there was an element of exaggeration in their response, since familiarity with English is culturally regarded as a status symbol. In all likelihood, therefore, these respondents considered it embarrassing to say "No" to this question. In other words, it can be safely stated that all the respondents in the uneducated and lower education categories would not have much success with reading and thereby developing even a basic understanding of the laws and regulations governing their cases. As a matter of fact, it can be further stated with a fair degree of assurance that even many in the higher educational category of Matriculation (equivalent to 10 years of schooling) would find the going arduous due to the highly variable quality of schooling as

In order to identify the gap, if any, between stated comprehension of English and actual comprehension of laws and regulations in English, the survey then focused on the 266 (almost 60 percent) of the overall respondents who had earlier stated that they comprehended English or comprehended it "somewhat." They were specifically asked if their stated levels of familiarity with English enabled them to understand the laws and regulations applicable to their case that were drafted in English. Stated comprehension, as it turned out, did not necessarily translate into an ability to comprehend the laws. Only 21.5 percent of the overall sample clearly responded in the affirmative, while another 23 percent said "somewhat." As many as 16 percent of the overall sample actually said "No." Adding this 16 percent to the 39.5 percent of the overall respondents who had earlier admitted that they did not understand English at all, we end up with over half of the overall respondents (55.5%) facing the predicament of not being able to comprehend the laws and regulations pertaining to their cases at all due to the language used. The same 266 respondents were further asked about their ability to understand court documents, legal contracts, deeds, etc. that were drafted in English. Again, stated comprehension of English did not always translate into an ability to understand legal documents in English. A mere 24 percent responded in the affirmative, while another 24 percent said that they could understand them "somewhat." On the other hand, 12.5 percent of the respondents said "No" to this question. Combining this 12.5 percent with the 39.5 percent of the overall respondents who had earlier admitted that they did not understand English at all, we once again end up with over half of the overall respondents (52 percent) facing the predicament of not at all being able to comprehend the court documents, legal contracts, deeds, etc. pertaining to their cases due to the language used. Finally, these 266 respondents were also asked if they were able to understand court proceedings that were in English. The outcome was predictable. A mere 25 percent of the respondents said "Yes." Another 22.5 percent said that they could "somewhat" understand

well as the technical language of the laws. It is also noteworthy that only two respondents in the lower educational categories actually affirmatively reported familiarity with English. While looking at the monthly household income of the respondents, those in the two lowest income categories fared far worse than those in the higher income categories. Proportionately speaking, twice as many (or 85 percent) of the respondents in the former categories said that they did not comprehend English or only comprehended it "somewhat," as compared to 42 percent of those in all the higher income categories, as well as those who did not disclose their income.

court proceedings in English. Finally, 13 percent of respondents said "No" to this question. Combining this 13 percent with the 39.5 percent of the overall respondents who had earlier admitted that they did not understand English at all, we once again end up with over half of the overall respondents (52.5 percent) facing the predicament of not at all being able to comprehend any court proceedings in English. The remarkable insight offered by these statistics is that for more than half of the litigants interviewed during the Lahore Survey, it was as if their legal contestations were taking place in a foreign jurisdiction. What the governing law said, what a legal document stated, and what a judge ordained was mostly incomprehensible to them.

It is worth reiterating here that a fair proportion of the court documents, land records, legal contracts, and court proceedings are also in Urdu. Dating from the Mughal era (350 years ago, when land revenue administration was undertaken in a major and systematic way in the Indian sub-continent), this is a highly Persianized version – a very different language from the contemporary Urdu of the market, streets, and homes. The respondents were asked about their level of comprehension of this anachronistic Urdu of the courts. While just over 53.5 percent of the respondents said that comprehension was not an issue, the remaining 46.5 percent thought otherwise. Some of the latter reported that they only "somewhat" understood the technical Urdu (13 percent of the overall respondents). Others, however, said that they did not understand it at all – either because it was too technical (20 percent of the overall respondents) or because of their lack of education (13.5 percent of the overall respondents). In other words, almost half of the overall respondents communicated difficulties in or their utter inability in understanding the technical legal Urdu used in legal and court proceedings.

Quite apart from the language of the courts, the Pakistani legal procedure and court processes are copious, complex, and also dated, envisioned as they were during the middle to the late nineteenth century and having undergone negligible amendment since. They can be an enigma, especially to litigants with little or no education, no prior litigation experience, and no available assistance from a knowledgeable support person. In such situations, a blind and unquestioning dependence on lawyers is inevitable – certain serious drawbacks of such dependence will be discussed shortly. The respondents were asked about their levels of comprehension of court and legal processes. Approximately 29.5 percent reported complete lack of comprehension, while an additional almost

23 percent reported occasional comprehension. As to the 44.5 percent of the overall respondents who claimed that they could fully comprehend legal procedure and court processes, there is sufficient reason to treat the claims of many among them with considerable skepticism.[84] Proportionately more female, less educated, and less affluent respondents reported lack of comprehension of legal procedure and court processes, as compared to male, more educated, and more affluent respondents.[85]

The respondents were also generally asked about their comprehension of their rights and remedies under the law. This was necessitated by the fact that knowledge of one's legal rights and remedies is not exclusively a function of one's ability to read and comprehend laws. Information about legal rights and remedies may also be available through, inter alia, more knowledgeable people in one's social circle, governmental, social development organizations or private sector programs and schemes for rights awareness, awareness generation initiatives by the print and electronic media, as well as any additional avenues of information. However, as it emerged, just about 50 percent of the respondents replied to this question in the affirmative, while the rest conceded no awareness of their rights (29 percent), only a partial awareness of their rights (18 percent), or did not respond to the question (3 percent). As expected, a greater

[84] While regular interaction with the courts can augment one's understanding of procedure and processes, one has to be wary of a fair degree of over-reporting in these responses. For one, saying "No" to this question could be taken to denote a certain level of naiveté and related vulnerability, which some of the respondents may have obviously been unwilling to communicate. Further, the acute limitations posed by complete incomprehension or partial comprehension of the laws, legal documents, etc., due to the fact that they are in English, has been reported earlier in this chapter. There ought to be a similar debilitating bearing on levels of comprehension of court procedure, which after all is also mostly in English. At the same time, one does acknowledge that since procedure and processes can actually be witnessed in practice in the conduct and operations of the courtrooms, a greater possibility of comprehension through direct observation does exist.

[85] In terms of gender, 62.5 percent of the female respondents and 49 percent of the male respondents reported problems of comprehension. In terms of education, 69 percent of the uneducated/less educated and 43 percent of the more educated respondents reported the same. The former proportion is likely to be even higher as one cannot but be skeptical about the claim made by some of the uneducated respondents and indeed also those with an education less than or equal to primary school that they fully understood the court processes and legal procedure. In terms of monthly household income, 60 percent of the less affluent and 39 percent of the more affluent respondents reported problems of comprehension. Another way to look at this is that almost three-quarters (72 percent) of all respondents who reported incomprehension of procedure and process fell in the two lowest income categories.

proportion of the less educated, less affluent, and non-city dwellers reported lack of awareness of rights.[86]

The Lahore Survey also asked the respondents whether their disputes were satisfactorily represented in their legal cases. Almost one-third (31.5 percent) of the overall respondents stated that their disputes were not satisfactorily represented in their legal cases, or that they were "not sure" whether or not they were, or that they simply did not know whether that was the case. As opposed to this, the remaining respondents claimed that their legal cases did satisfactorily represent their actual disputes. However, this number has to be considered with a fair amount of skepticism and is likely to be much lower.[87] The respondents who said that their disputes were unsatisfactorily or inadequately represented in their legal cases were asked for their reasons for saying so and allowed multiple responses. Importantly, two of the most frequent responses put the blame on the lawyers. The most common response was that "the parties wanted to settle but the lawyers/court was embroiling them in the case," followed by the assertion that "the lawyer excluded certain facts and contestations as part of his legal strategy." Additional common responses were "lack of

[86] Less than one-third (31.5 percent) of the uneducated/less educated respondents reported rights awareness as compared to 60 percent of the more educated respondents. In terms of household income, only 40 percent of the less affluent respondents reported rights awareness, as compared to 66.5 percent of the more affluent respondents. In terms of the rural–urban spectrum, 34.5 percent of the respondents from the villages and 31 percent of the respondents from small towns claimed rights awareness, as compared to 49 percent of those from the suburbs of Lahore and 53.5 percent of those from the central city.

[87] This becomes apparent if one appreciates the aforementioned educational qualifications of the respondents and also respondent feedback on their general comprehension of English, as well as their specific capacity to understand laws, regulations, court documents, legal contracts, deeds, and court proceedings in English. This feedback rules out the possibility that 68.5 percent of the respondents actually knew for sure that their legal cases accurately reflected their disputes. The most obvious reason why certain respondents preferred to say "Yes" to this question (quite apart from those who actually knew and/or genuinely felt the same) is the perceived public embarrassment of acknowledging before a stranger that they did not comprehend their own court cases. There is another possible reason that became apparent from the demeanor of certain respondents with lower educational qualifications. They immediately said "Yes" in response to this question (while being comparatively reluctant when answering other simpler questions), thus displaying their apprehension that admission of lack of knowledge of their legal cases would somehow make their cases appear weak, dishonest, or frivolous. It was plain to see that respondents who were otherwise unsure would immediately become guarded and defensive when this particular question was asked. On being further probed, quite a few of them admitted that their knowledge of their cases was based exclusively on what their lawyers had told them and not on any direct reading and evaluation of their legal documents and/or an independent corroboration.

evidence or unavailability of witnesses for certain facts or contestations" and that "the lawyer omitted certain facts or contestations due to carelessness or lack of attention."

The judges

Judges the world over have a certain aura of grandeur and picturesque aloofness, especially for ordinary litigants. They can be deemed unapproachable and even intimidatory, separated from and placed above the ordinary litigants as they are by their education, specialized knowledge and skills, social status, and vast decision-making powers regarding the fate of the litigants' life, liberty, and property. The formal environment of the court – the stiff etiquette, the immaculate dress code, and the elaborate forms of address and court manners are at some levels necessary to maintain a certain decorum. In Pakistani appellate courts, judges are still addressed as "Your Lordship" or equally exalted substitutes in Urdu. However, these mannerisms and trappings can also be highly awe-inspiring for the many who are already forced to adopt meek and subdued demeanors due to their various social and economic handicaps, especially in contexts like Pakistan. Given all this, there was understandably a marked reluctance and visible apprehension on part of many of the respondents to speak openly about their experiences with and perceptions of the judges. They were also highly anxious about the fact that the survey were being held in close proximity to the courtrooms in which their cases were being heard, and that they were being asked to speak candidly – and that too by complete strangers – about the very judges who were to decide their fates.

Nevertheless, the Lahore Survey made an attempt to obtain respondent feedback on the various performance facets of the judges – both the current judges presiding over their instant cases as well as any other judge(s) who may have presided over their cases in the past. They were first asked for their opinion on the level of competence of their judges. While many respondents had been candidly critical of their court experiences during the course of the interviews, quite a few of them became reticent upon being posed this question. Consequently, almost one-quarter (22.5 percent) of the respondents simply declined to answer the question. Quite a few of those who declined to answer extended the plausible explanation that being uneducated or with little education they were completely reliant on their lawyers, and hence not in a position to gauge the competence of the judges. Despite the general inhibition to

respond, over one-third of the respondents (35 percent) communicated that they were either "unsatisfied" (22 percent) or "deeply unsatisfied" (13 percent) with the competence level of the judge/judges. A slightly larger segment stated that it was "satisfied" (37 percent) with the competence of the judge/judges, and an additional 5.5 percent of the respondents were zealous in praising the competence of the judge/judges, declaring that they were "highly satisfied." When it came to discussing the competence of judges, the more educated respondents were also the ones who were proportionately more vocal in their criticism.[88]

Speaking to the respondents about their perceived impartiality and integrity of the judges was an even more difficult and awkward task. Nevertheless, a surprisingly high number of respondents divulged that they had their doubts about the impartiality and integrity of the judicial officers hearing their cases. Almost one-third of them (30 percent) said they were "unsatisfied" (17 percent) or "highly unsatisfied" (13 percent) on this score. Another 24.5 percent excused themselves from responding to the question. More male respondents were critical in response to this question. However, there was not much variation in the responses across the educational and monthly household income spectrums, except that a proportionately higher number of the female, less educated, and less affluent respondents declined to answer this question.[89]

[88] 37.5 percent of the more educated respondents were strongly or moderately critical, as compared to 31 percent of the uneducated/less educated respondents. However, it needs to be noted that a greater proportion of the latter also chose not to respond to this question (29.5 percent), as compared to 18 percent of the former, either because they felt apprehensive about speaking on such matters or because they felt they did not have the requisite information/exposure to comment.

[89] 33 percent of the male respondents said that they were "unsatisfied" or "deeply unsatisfied" with the integrity of the judges, as compared to 19 percent of the female respondents. 32 percent of the female respondents declined to respond to this question, as compared to 22 percent of the male respondents. 31 percent of the uneducated or less educated respondents declined to answer the question, as compared to 20.5 percent of the respondents with higher than secondary school education. Almost twice as many less affluent respondents (29.5 percent) were reluctant to respond to this question, as compared to the ones who fell in the higher income categories (15 percent). This is important. One does not want to take anything away from the sincerity and credibility of the responses of those who expressed satisfaction with the impartiality and integrity of the judges. However, the fact that almost one-third of the poorer respondents declined to answer this question could be as much due to a certain meekness or lack of requisite personal observation and experience for meaningful comment, as it may be because they did not want to voice their discontent. There is credence to the existence of the latter motivation because, after all, they could have easily said that they were "satisfied" or "highly satisfied" on this score. That would have been the "safest" answer while talking about the judges to complete strangers. Significantly, they did not opt for the "safe" answer.

A relatively higher percentage of the respondents had no complaints about the politeness and courtroom courtesy of the judges. Just over 10 percent of the respondents, however, said that they were "unsatisfied" with the attitude of the judges; another 8.5 percent of the respondents stated that they were "highly unsatisfied" with the attitude of the judges; and almost one-quarter of the respondents (23.5 percent) once again declined to answer the question. Collectively they add up to 42 percent of the overall sample – in other words, these are the respondents who had something negative or nothing whatsoever to say about the attitude of the judges. The more educated respondents and male respondents were somewhat more vocal in their criticism (however, once again one ought to consider that proportionately more uneducated/less educated respondents opted to stay silent). There was not much variation across the income or gender spectrum except that once again proportionately more women as well as the less affluent respondents opted to stay silent.[90]

The respondents were also asked about their experience and perception of the ability of judges presiding over their cases to overcome and discipline any tactics by the lawyers to cause delay, their rude or unprofessional behavior in court, and/or any attempts on their part to influence the judges' decision-making. More than one-third of the respondents (35 percent) said that they were "unsatisfied" (21 percent) or "highly unsatisfied" (14 percent) with the performance of the judges on these scores. Another almost one-third (32.5 percent) of the respondents declined to respond to this question. More male, educated, and affluent respondents were proportionately more critical of the judges than their counterparts. However, once again a proportionately higher number of female, less educated, and less affluent respondents declined to answer the question.[91]

[90] 20.5 percent of the more educated respondents were critical of the attitude of judges, as compared to 15.5 percent of the uneducated and less educated respondents. 30 percent of the uneducated and less educated respondents did not respond, as compared to 19.5 percent of the more educated respondents. 20.5 percent of the male respondents and 14 percent of the female respondents reported that they were "unsatisfied" or "deeply unsatisfied" with the attitude of the judges. Importantly, 30 percent of the female respondents did not answer this question, as compared to 21 percent of the male respondents. 19 percent of the less affluent respondents reported lack of satisfaction with judicial attitudes, while 19 percent of the more affluent respondents also said the same. However, 28.5 percent of the less affluent respondents did not respond to this question, as compared to 15 percent of the more affluent respondents.

[91] 36.5 percent of the male and 29 percent of the female respondents expressed their dissatisfaction. However, only 30 percent of the male respondents did not respond to

During the first phase of the Lahore Survey (207 interviews), a fair number of respondents pointed out an additional problem. They complained that their presiding judges were repeatedly transferred and/or their cases were frequently shifted to new judges, thus adding further delay to the case proceedings. In view of this, a new question was added to the questionnaire in the second phase of the survey (233 interviews). In view of administrative restructuring or operational imperatives, the routine transfer of judges as well as the reallocation of ongoing cases to new courts is usual practice in court systems. However, it emerged that a remarkable 48.5 percent of the respondents in the second phase of the survey reported that the judges presiding over their cases had been transferred and/or their cases had been shifted to new courts at least twice. This may be attributable both to systemic flaws and lack of cohesion constraining the overall administrative structure and judicial policy or to the very longevity of the cases so that they span over the normal tenure of several judges. Either way, respondent feedback was unambiguous that such transfers/shifts further elongate and complicate litigation. Quite disturbingly, almost 19 percent of the respondents reported that so frequently had their presiding judges changed and/or their cases transferred to new judges that they had simply lost count of the number of times this had occurred.

The respondent feedback on the professional performance and sense of responsibility of the court staff was markedly less inhibited, as only 16.5 percent of the respondents did not reply to the question. Almost half of the respondents (49 percent) said that they were "unsatisfied" (23 percent) or "highly unsatisfied" (26 percent) with the court staff. They also spoke openly about rampant corruption and their inability to push their cases along without meeting constant demands for "speed money." Importantly, more than one-quarter (26 percent) of the respondents expressed a strong opinion on this matter, as they said that they were "highly unsatisfied" with the performance of the court staff. Proportionately more male, educated, and affluent respondents were

this question, as compared to 39.5 percent of the female respondents. 38 percent of the more educated respondents were critical, as compared to 29 percent of the uneducated and less educated respondents. However, 37 percent of the uneducated and less educated respondents were reluctant to respond to this question, as compared to 30 percent of the more educated respondents. 33 percent of the less affluent respondents expressed their dissatisfaction, as compared to 38 percent of the respondents in all of the higher income categories. However, 39.5 percent of the less affluent respondents declined to respond to this question, as compared to 20.5 percent of the affluent respondents.

critical in their views. However, once again the female, less educated, and less affluent respondents were also proportionately more reticent in responding to the question.[92]

Although the respondents were relatively reluctant to speak openly in response to direct questions about their perception of judicial impartiality and integrity, they were much more vocal when speaking generically about corruption in courts. Some of them even went so far as to admit to having bribed judges. According to one of the plain talkers, "Honesty has no place in court proceedings. I myself have bribed judges and judges get bought routinely through their touts who roam around the court corridors. Lawyers can also be bought."[93] Another respondent confessed, "The lower courts are really weak and corrupt. They operate purely on corruption. I can tell you that I have bribed the judge. Now he is in my pocket. This is the reason why Pakistan will fail one day."[94] Another interviewee protested, "Judges and lawyers have made the legal system a money-making business."[95] One respondent claimed, "One can get any suitable date for the next day of hearing. It depends on the amount of bribe one is willing to pay. This is how this system works."[96] One of the respondents vented his ire vis-à-vis the court staff: "If they had their way, the greedy court staff would even peel off the flesh from our bodies."[97] While another lamented, "The reason why I am stuck in this court process for the last 8 years is that I have no money to give to the judges in order to push along my case. Can you please bring my case to the Chief Justice's attention?"[98] Yet another respondent sarcastically jibed, "Everything is fine with the legal system,

[92] 53 and 37 percent of the male and female respondents respectively were critical. However, 22 and 15 percent of the female and male respondents respectively did not answer this question. In keeping with the trend shown by responses to previous questions, 53.5 and 41 percent of the more educated and uneducated/less educated respondents respectively were critical. However, only 13.5 percent of the former declined to answer the question, as compared to 22 percent of the latter. 46.5 percent of the less affluent respondents were critical in their feedback, as compared to 53 percent of the more affluent respondents. However, 20.5 percent of the former declined to answer this question, as compared to only 10 percent of the latter.

[93] Interview with Respondent No. 143, January 23, 2011.

[94] Interview with Respondent No. 185, December 24, 2010.

[95] Interview with Respondent No. 150, December 23, 2010.

[96] Interview with Respondent No. 6, December 20, 2010.

[97] Interview with Respondent No. 208, January 3, 2011.

[98] Interview with Respondent No. 181, December 24, 2010.

as long as you are willing to pay a bribe. In future, if faced with a similar dispute I shall just use *Quaid-e-Azam*."[99]

Quite a few of the respondents blamed corruption and, in their view, the consequent decrease in credibility and stature of judges as the main contributory causes for what they described as the breakdown of the legal system. Citing an example of falling standards, one interviewee reported, "My opponent threatened the judge in open court!"[100] Another interviewee said, "Such is now the extent of the rot in the system that we feel that a person is honest if he takes a bribe but at least delivers in return, as there are many who take a bribe and even then they don't help you."[101] A resigned litigant summed up the dark mood of the more vocal critics: "This is the *Aiwan-e-Adal* (pavilion of justice) but there is no *adal* (justice) here."[102]

The men in black

In the lead-up to India's independence, many native lawyers proved their mettle as the greatest champions of their era for liberty or death. They remain global icons. Post-independence, the Pakistani legal fraternity's pro-democracy sacrifices are the precious luminous chapters in the vast murky saga of its various martial laws. However, starkly apparent in recent years is this very fraternity's inability to separate its "political" role from its "professional" responsibilities. It has been staunchly resistant to several ideas and opportunities for self-regulation, accountability, reform, and upgrading of ethical and professional standards. In many ways, talking to the respondents about their lawyers was the most difficult and somewhat risky aspect of the Lahore Survey. This was due to the almost total reliance of many respondents (especially those who were less affluent and educated) on the skill, advice, and support of their lawyers. Furthermore, the interviews were conducted in crowded court premises, often within earshot of the interviewees' black-clad lawyers.[103]

[99] Interview with Respondent No. 365, January 6, 2011. All Pakistani currency bills carry the image of the founder of the nation, Muhammad Ali Jinnah, who is reverently referred to as the "Quaid-e-Azam," or the great leader. The less reverent or the humorously inclined also refer to Pakistani currency bills by the same term.

[100] Interview with Respondent No. 233, January 3, 2011.

[101] Interview with Respondent No. 285, January 4, 2011.

[102] Interview with Respondent No. 403, January 7, 2011.

[103] Lawyers all over Pakistan are required by bar council regulations to dress in a uniform that consists of a black suit and tie, with some variations allowed either for the summer

Given the above, many of the respondents were quite reluctant to speak directly about their lawyers or their level of satisfaction with the legal advocacy services being extended to them. However, in their general narratives about their overall experiences in the court system, quite a few of them were much less inhibited in their evaluation of lawyers. Some of the comments were starkly condemnatory, motivated as they were by highly unpleasant personal experiences. Typical of this sort of feedback were comments such as: "Lawyers are thugs and Satans";[104] and "When the first lawyer was born, Satan proudly declared that my accomplice has arrived on earth."[105] At times, fairly drastic metaphysical predictions were made: "I can say with certainty that all these people in black coats and pants will go to hell as they are all scoundrels. If you see their faces, none of them reflects the light of honesty. That is because they are petty and dishonest."[106] Another similar comment was that: "The lawyers are all engaged in consuming *haram* (un-kosher) income."[107] An "us" against "them" divide or a sense of victimization also characterized some of the comments, such as: "The judges and the lawyers speak very nicely but they are cunning and play with words in order to fool us simple people;"[108] and "There is an unholy alliance between the judges and the lawyers."[109] For some others, lawyers simply presented a deeply enigmatic spectacle that led to a sense of bewilderment: "Lawyers are the most *ajeeb-o-ghareeb* (weirdest) people that I have ever come across."[110]

Others respondents elaborated more on the underlying reasons for their discontent. They pointed out instances of professional irresponsibility, delaying tactics, greed, and lack of financial integrity. One of the respondents hurriedly shared: "All the lawyers are the same. They are inefficient and don't perform the responsibilities owed to their clients. But I can't say much more right now because I think my lawyer is coming

months or for those who would prefer instead to wear a *Shalwar Qameez* (a loose, long shirt and baggy trousers, which is also Pakistan's national dress). However, a black coat is still mandatory and this the most characteristic sign of a lawyer. The term "black coats" is commonly used to refer to lawyers as a profession or even as a metaphor for a zealous and similarly motivated class of people.

[104] Interview with Respondent No. 412, January 7, 2011.
[105] Interview with Respondent No. 106, December 22, 2010.
[106] Interview with Respondent No. 184, December 24, 2010.
[107] Interview with Respondent No. 14, January 23, 2011.
[108] Interview with Respondent No. 100, December 22, 2010.
[109] Interview with Respondent No. 238, January 3, 2011.
[110] Interview with Respondent No. 376, January 6, 2011.

this way."[111] Another respondent complained, "It is the lawyers who cause all the delay as the longer the cases linger the more they can line their pockets."[112] Yet another respondent had the following to say: "Lawyers are corrupt! They get bribed by the opposing party and don't allow the cases to come to a decision. Meanwhile, the judges keep granting adjournments. My case has been going on for 12 years and sometimes I just feel like giving up. There is no justice here!"[113] Others were similarly scathing. According to one litigant, "Lawyers are corrupt in ninety percent of the cases!"[114] He was echoed by another respondent: "Lawyers have a going rate for everything. Even if you want the case delayed they will charge you for it and get it done."[115] To some the situation was unequivocal: "The lawyers take money from both sides."[116] One of the interviewees summed up this line of criticism: "The lawyers have only one interest – money."[117]

Other respondents were quite keen to talk at length about their experiences with lawyers, treating the interview as an opportunity for catharsis or as an act of defiance against those who they felt had wronged them deeply. One of them narrated, "Let me tell you about one of their money-making tactics. Just when the court usher calls one's case for hearing, the lawyer asks for Rs. 500 or Rs. 1,000 with the ruse of having to take care of some urgent case related expenses. Given how anxious litigants generally are and the clever timing of the demand, one has no option but to hand over the money or else risk offending the lawyer and possibly encountering his refusal to appear in court."[118] The criticism also extended to the opposing lawyers' skill at keeping unmeritorious cases alive. One respondent said, "My opponent's case has been dismissed four times for non-prosecution but his lawyer somehow manages to resuscitate it every time."[119] A female respondent had the following to share about the lack of progress in her case: "When I filed this case 2 years ago my first lawyer took Rs. 20,000 from me, but he simply did nothing. Not even a single hearing took place during this time. I have since retained a new

[111] Interview with Respondent No. 173, December 24, 2010.
[112] Interview with Respondent No. 127, January 23, 2011.
[113] Interview with Respondent No. 275, January 4, 2011.
[114] Interview with Respondent No. 164, December 24, 2010.
[115] Interview with Respondent No. 353, January 4, 2011.
[116] Interview with Respondent No. 252, January 3, 2011.
[117] Interview with Respondent No. 30, December 20, 2010.
[118] Interview with Respondent No. 1, December 20, 2010.
[119] Interview with Respondent No. 1, December 20, 2010.

lawyer and today it is the first hearing of the case in 2 years. But I am not confident about him as well. I feel that since I am a woman they think that they can hoodwink me and get away with it."[120]

Another respondent seemed highly agitated at his lawyer's evasive tactics: "Lawyers are compulsive liars! My lawyer told me this morning that he is already present in court and waiting for me. I have now been here for over 2 hours and he has not yet arrived. And this is not the first time that this has happened. One time, a friend of mine was involved in litigation and could not personally supervise his case in court as he was very busy. His lawyer would always tell him that the case hearing had been postponed. One day the lawyer said the same but my friend happened to be in the vicinity of the court complex. He went himself to check on the status of his case and realized that the matter had actually been decided in his favor some days ago. His lawyer did not even know of this as he was in the habit of skipping the court hearings and then lying to my friend that they had been adjourned."[121] A female respondent accused her lawyer of foul play: "My ex-lawyer is a fraud as he deceived my mentally unstable husband into transferring some of our land to him. I found out about this and tried to put a stop to it. Now he has filed a case against us to claim the land on the basis of the documents that he fraudulently got signed by my husband."[122] Another allegation was: "My opponent's lawyers assist him in forging property and other legal documents."[123] One of the respondents accused his lawyers of selling him out, "My lawyers colluded with my opponent and we only found out very late in the day that this had happened."[124] Switching lawyers had not solved the problem for another interviewee: "I have changed my lawyer thrice. My experience has been that they take your money and then go over to the other side."[125]

As mentioned previously, Pakistani lawyers have historically been very active in national and local politics. They have also consistently played a robust pro-democratization role, especially during long periods of military rule, which has won them much public appreciation. Their greatly heightened political mobilization in the post-Lawyers' Movement era,

[120] Interview with Respondent No. 328, January 6, 2011.
[121] Interview with Respondent No. 400, January 7, 2011.
[122] Interview with Respondent No. 93, December 21, 2010.
[123] Interview with Respondent No. 110, December 22, 2010.
[124] Interview with Respondent No. 253, January 4, 2011.
[125] Interview with Respondent No. 18, December 20, 2010.

however, was also criticized by some of the respondents. These critics felt that constant politicking disrupted the lawyers' professional work and adversely affected their clients' legal cases. They also expressed concern at what they described as increasingly aggressive, and at times violent, behavior of certain sections of lawyers toward their political opponents, and even toward judges who did not give in to their pressure to decide cases one way or the other. One respondent described her shock upon witnessing such an episode: "As a pressure tactic, a female lawyer assembled a crowd of her ally lawyers in the court of a female judge and also used abusive language."[126] Another respondent reported: "These days the lawyers are so aggressive that judges try and stay out of the fray when they fight amongst each other in the courtrooms."[127] One of the interviewees felt that: "Lawyers are headed in the wrong direction. They are more interested in politics than in representing their clients."[128] His views were shared by another: "They just want to protest and go on strikes all the time."[129]

Additional respondent feedback reflected a deep sense of despair at what was perceived as a general breakdown of ethical and professional regulation of the legal profession. One respondent pointed out the role of some lawyers in causing delay rather than seeking a remedy for the client: "Whichever party has the weaker lawyer adopts the strategy to keep on delaying the outcome of the case."[130] Another interviewee expressed a sense of helpless dependence: "Both contesting parties suffer at the hands of lawyers as both have to keep changing them and paying them."[131] Another respondent underlined the need for constant vigilance: "If I don't keep a constant eye on my lawyer he simply does nothing."[132] For some the only solution left was to represent themselves: "My lawyer kept prolonging my case. Ultimately I fired him and now I represent myself."[133]

Moving on to a statistical analysis of the overall respondent feedback about lawyers, the proportion of the respondents who were "satisfied" or "highly satisfied" with their lawyers includes many who genuinely meant

[126] Interview with Respondent No. 405, January 7, 2011.
[127] Interview with Respondent No. 385, January 7, 2011.
[128] Interview with Respondent No. 11, December 22, 2010.
[129] Interview with Respondent No. 176, December 24, 2010.
[130] Interview with Respondent No. 111, December 22, 2010.
[131] Interview with Respondent No. 59, December 21, 2010.
[132] Interview with Respondent No. 228, January 3, 2011.
[133] Interview with Respondent No. 217, January 3, 2011.

it, as was corroborated in their more detailed qualitative feedback. However, there were also those among them who keenly wanted to avoid any misunderstanding with their lawyers: this became evident in their evasiveness in response to the direct question about their lawyer's performance as opposed to their much more effusive critical feedback in response to more generic questions about the challenges and problems they had faced in their legal battles. In the latter conversations, they often obliquely criticized lawyers, including their own. Furthermore, in response to the direct question about their lawyers' performance, many of the respondents essentially spoke about their current lawyers and not their past experience with lawyers. Despite their inhibitions against speaking openly, 27.5 percent of the respondents still said that they were "unsatisfied" or "deeply unsatisfied" with the performance of their lawyers, while 7.5 percent of the respondents declined to answer the question. Proportionately, more female, more educated, and less affluent respondents were more vocal in their criticism.[134]

Once it emerged from the first phase of the Lahore Survey (207 interviews) that the respondents were reluctant to talk about their lawyers, an additional question was added in the second phase (233 interviews) to indirectly gauge the litigants' experience of lawyers. This was in view of the fact that quite a few respondents, while expressing satisfaction with their current lawyers, had pointed out that previous bad experiences had led them to change their lawyers, at times more than once. While more than half of the respondents (55.5 percent) said that they had not changed their lawyer, exactly one-quarter of the respondents reported changing their lawyer twice or more, which is a fairly high proportion – this is while acknowledging that changing the lawyer may also be attributable to reasons other than lack of satisfaction with

[134] 31 and 26.5 percent of the female and male respondents respectively expressed dissatisfaction. 29 and 25 percent of the more educated and uneducated/less educated respondents respondents respectively expressed dissatisfaction. 9.5 percent of the uneducated/less educated respondents were reticent about replying to this question, as compared to 7 percent of the more educated respondents. 28.5 percent of the less affluent respondents expressed dissatisfaction, as compared to 26 percent of the respondents from the remaining higher income categories. However, it is interesting to further note that all respondents who said that they were "deeply unsatisfied" with their lawyers fell in the bottom five income categories and 63 percent of these were actually in the bottom three income categories. Furthermore, 82.5 percent of the respondents who did not respond to this question also fell in the bottom two income categories.

performance. Of the total number of respondents, 9 percent were still uncomfortable in responding to any question about lawyers.

The respondents were also asked how they had chosen and retained their lawyers. 'Personal contact' emerged as the most prominent response (20.5 percent), followed by "referral through a friend" (17.5 percent), "family contact" (15 percent), and "reference through someone in the locality/community in which the interviewee lives" (15 percent). However, 13.5 percent of the respondents also said that they "randomly approached lawyers in the district court and made a selection."[135] The less educated and less affluent respondents seemed more reliant on others for referring a lawyer to them than on their own prior contacts or personal networks.[136]

Respondents expressing dissatisfaction with their lawyers' performance were asked for their reasons and allowed multiple responses. "Punctuality in appearing in court" (60); "following client's instructions" (49); "delays" (43); "effectiveness of argumentation in court" (41); "overbooking of cases and resulting unavailability" (39); "legal fees and expenses" (33); "competence in law" (26); "explanation of the client's case and his/her legal strategy" (16); and "availability to answer client questions" (16) were the most frequent responses.

[135] For female respondents, "reference through someone in the locality/community in which the interviewee lives" and "reference through a friend" were the most common responses, as compared to male respondents for whom "personal contact" and "reference through a friend" were the most common responses.

[136] Almost one-fifth (19 percent) of the less educated and uneducated respondents "randomly approached lawyers in the district court and made a selection," as compared to 10.5 percent of the more educated respondents. Furthermore, 17 percent of the less educated and uneducated respondents relied on the fact that "the lawyer was recommended by someone in the locality/community in which they lived," as compared to 14 percent of the more educated respondents. Local referral seems particularly important for uneducated respondents, as over one-quarter of them (25.5 percent) made their choice based on this. "Random approach" also figured prominently (70 percent) as a response among the less affluent respondents. All of the respondents who made their decision based on the fact that "the lawyer was an officeholder of the bar" also belonged to the two least affluent categories. Also, 80 percent of the respondents who decided on the basis of "referral from *biradari* or caste" and 66.5 percent of those who decided based on "a referral from someone already fighting a legal battle" belonged to the two lowest income categories. Furthermore, 59 percent of the respondents who relied on "a referral from someone in the locality/community in which they lived" also belonged to the two lowest income categories. "Personal contacts," "family contacts," and "contacts through friends" were important factors across the income categories, but proportionately more so for the more affluent income categories.

Why come to court?

Despite the various kinds and levels of litigant dissatisfaction described above, Pakistani courts are thronging with litigants and the rate of litigation is steadily rising. This necessarily raises the question as to what motivates all these people to come to court in the first place. In the American context, one persuasive view is that people are motivated by a "sense of legal entitlement" based on "a broad sense of rights."[137] This perspective highlights a desire on part of sections of American society to escape from the community and to use the law to challenge social hierarchies in families and communities; to create space within established social orders; and hence positively embrace the services and entitlements available through the state.[138] This argument draws strength from the historically generally positive role of the law in the United States to invite personal problems to courts, and to make the courts more accessible to all social classes. The fact that courts have at times positively and effectively intervened on behalf of the disadvantaged to protect the weak and vulnerable, for social justice, and against big business and corporate power are put forth as further positive motivations for people to come to court.[139]

This inspires a closer look at post-colonial legal systems, and the question of whether they have managed to create the enabling environment and positive precedents that may instill an impetus among the disadvantaged and marginalized citizenry of these countries for approaching the formal court system. In social contexts like Pakistan, the courts take on added significance as potential saviors, as the relative position of power of a vast bulk of the citizens is quite weak vis-à-vis the community as well as the state – such inequity of power is in many ways a function of relative access to social networks, economic status, political capital, the willingness and ability to use violence and escape accountability, and additional factors such as gender, religion, caste, and ethnicity. These very weaknesses and vulnerabilities may draw many to the courts, as they may be acutely short of any viable alternatives.

At the same time, one has to consider that many people may want to keep away from the courts as recourse to the courts can also have paradoxical consequences for them. By accessing courts, they may

[137] See Merry, *Getting Justice and Getting Even*, pp. 172–6.
[138] Merry, *Getting Justice and Getting Even*, pp. 172–6.
[139] Merry, *Getting Justice and Getting Even*, pp. 176–9.

discover a degree of empowerment vis-à-vis the person being complained against, but then they may also risk social stigmatization and/or reprisal. Most importantly, they may fear loss of control due to greater state intrusion in their affairs that may "reformulate and reinterpret these problems' meaning and consequences."[140] They may also apprehend the complexity and inaccessibility of the judicial system, as well as the potential lightness of penalties in comparison with their expectations, and thus feel that their problems are not taken seriously as "legal problems," but treated "as issues of morality or therapy."[141] This important insight highlights what Sally Engle Merry calls the "cultural domination" of the courts – as the latter, at times, use their legal authority to frame problems in other discourses and offer non-legal solutions, thus denying the protections and help promised by the legal system.[142] The "cultural domination" of law comes from the fact that it does not just impose rules and hand out punishments, but "also by its capacity … construct[s] authoritative images of social relationships and actions, images which are symbolically powerful."[143] The law thus provides "a set of categories and frameworks through which the world is interpreted," making it "a discourse, a way of talking about actions and relationships," – and it can be a limiting discourse in that it can assert some meanings and silence others.[144] There can thus be a contest between the different discourse of law and its categories and remedies, the discourse and the categories and remedies of morality, and then the categories and remedies of the helping professions.[145] Sally Engle Merry argues that this vital discordance between what is a legitimate issue meriting a legal resolution in the popular imagination and what courts consider to be "justiciable" is often lost sight of.[146]

Recognizing that the aforementioned impetuses for approaching the court, as well as the reasons for avoiding it, may also have significant traction in the Pakistani context, the Lahore Survey sought to find out what motivated the respondents to approach the courts in the first place.

[140] Merry, *Getting Justice and Getting Even*, pp. 2–3.
[141] Merry, *Getting Justice and Getting Even*, pp. 2–3, 8.
[142] Merry, *Getting Justice and Getting Even*, p. 180.
[143] Merry, *Getting Justice and Getting Even*, p. 8.
[144] Merry, *Getting Justice and Getting Even*, pp. 8–9.
[145] Merry, *Getting Justice and Getting Even*, p. 10.
[146] Merry, *Getting Justice and Getting Even*, p. 10. And as Merry says, ultimately, and very importantly, not taking cognizance of people's perceptions is potentially problematic and disruptive to the larger social order (p. 10).

The results revealed a clear preference on the part of the many of the respondents to resolve their disputes on their own, rather than resorting to the courts. Their reluctance to come to the courts was based on some of the inhibitions described above, as well as heightened wariness about getting embroiled in potentially time-consuming, costly, and often ultimately inconclusive litigation. One of the respondents was categorical as to what was the sensible choice: "If one can settle out of court, one always should. Only those can afford to come to court who have ample money and time. If you don't have ample money and time you should just forget about your dispute and losses."[147] Another respondent was highly remorseful about having made the decision to come to court in the first place: "After getting humiliated in the civil courts for 30 years, I am now trying to somehow get my dispute settled out of court. Thirty years is a big portion of one's life to waste in a legal case."[148] Referring to the perceived social stigma attached to approaching the courts for resolving one's disputes, one of the interviewees said, "'*Shareef*' (upright) people don't want to come to courts. They don't want to get involved with the courts but they are left no option."[149] Yet another interviewee opined, "A courtroom is a recipe for wasting one's wealth, dignity and life."[150] This was dismally echoed by another interviewee: "If someone wants to destroy their life they should come to the courts. I consider myself a fool who aimlessly roams around these corridors."[151]

Given the strong sentiments expressed against opting for the courts to resolve disputes by some of the respondents, the Lahore Survey asked all respondents whether they had ever been approached by their opponents to reconcile the matter out of court. A little over one-quarter (26 percent) of the respondents conceded that their opponents had indeed approached them for reconciliation. There was some variation in this response based on the education and monthly household income variables.[152] Also, a smaller percentage of respondents from villages (19 percent) and small towns (15.5 percent) were reportedly approached by their legal opponents for out-of-court settlements as compared to

[147] Interview with Respondent No. 2, December 20, 2010.
[148] Interview with Respondent No. 17, December 20, 2010.
[149] Interview with Respondent No. 397, January 7, 2011.
[150] Interview with Respondent No. 418, January 7, 2011.
[151] Interview with Respondent No. 431, January 7, 2011.
[152] 22 and 28.5 percent of the uneducated/less educated and more educated respondents respectively were approached for reconciliation. 25.5 and 27.5 percent of the less affluent and more affluent respondents respectively were approached for reconciliation.

respondents from the suburbs (26 percent) and central city (28 percent). Those reporting approaches by legal opponents for out-of-court settlements were probed for the reasons for the failure of such offers and allowed multiple responses. The most frequent response was essentially that "the offer made was unfair" (77). "Trust deficit and the consequent need for a court process and a legal verdict to bring certainty and closure to the disputed matter" (40) emerged as the next most popular-cited reason.

As compared to reported approaches by legal opponents for out-of-court reconciliation, many more respondents reported that they themselves had approached their legal opponents for an out-of-court settlement/reconciliation. Almost three times as many (61 percent) of the overall respondents reported this, as compared to just over 26 percent of the overall respondents who had said that their opponents had approached them for an out-of-court settlement of the dispute. This provides an indication of the relatively low bargaining power of the Lahore Survey population as many more people reported an initiative on their part to settle the dispute out of court as compared to a similar initiative on part of their legal opponents. It further shows the propensity of a majority of the Lahore Survey respondents to avoid the courts. There were almost an equal number of respondents across the education and monthly household spectrums who reported approaching opponents for reconciliation.[153]

The respondents were then asked why their initiatives to reconcile resulted in failure and multiple responses were allowed. The most commonly offered reason was that "the legal opponent is unreasonable" (188). However, very interestingly, the coercive possibilities of taking a dispute to court were highlighted by the second and third most popular responses which were, respectively, "the legal opponent wants to waste my time and energy in court before coming to the negotiation table" (68) and that "due to our enmity the legal opponent does not want a resolution of the issue but wants to insult me and drag me through the court" (36). Other responses hinting at a propensity to use the court to settle personal scores were that "others in his family or community want this litigation to continue" (23) and "my legal opponent has made this dispute a matter of personal pride" (19). A significant overarching reason for

[153] 59 and 61.5 percent of the uneducated/less educated and more educated respondents respectively reported this. 61 and 60.5 percent of the less affluent and more affluent respondents respectively reported this.

coming to or rather ending up in court, as reported by the Lahore Survey respondents, therefore, was not one stemming from a "sense of legal entitlement," based on a "broad sense of rights," or inspired by faith in court-based justice, but indeed a rather negative one – collectively, there were as many as 146 respondents who indicated that they believed their opponents had dragged the matter to court in order to pressurize, insult, and/or punish them, and but for such nefarious intent the dispute could have been resolved out of court. This is in addition to the 188 responses that blamed the failure of the reconciliation attempt on the "unreasonableness" of the legal opponent.

There was widespread propensity to continue to explore an out-of-court settlement despite failed attempts in the past, as shown by the fact that 41 percent of the overall respondents unconditionally said that they would be willing to do so if they were approached in future for such a settlement. Another 17.5 percent kept the option open by saying that their decision would depend upon the nature of the offer made to them, but that in principle they would not be averse to settling the dispute out of court. An additional 11.5 percent were unsure as to what they would do in such a scenario. This essentially left only 30 percent of the respondents who were not interested in settling out of court in future and wanted to persist with the litigation. Male respondents and the more educated as well as more affluent respondents displayed a somewhat greater inclination for an out-of-court settlement in the future.[154]

The respondents who had expressed the willingness to explore an out-of-court settlement in the future, despite failed attempts in the past, were asked to explain their reasons and allowed multiple responses. The most common and rather telling response was that "after their experience of the court process, an out of court solution seemed simpler and quicker now" (97). Other common responses were: "dissatisfaction with the efficiency of the court process" (88); "dissatisfaction with the fairness of the court process" (36); they "did not have the energy to continue pursuing a legal remedy" (32); they "did not have the financial resources

[154] Men displayed greater inclination (43.5 percent) as compared to women (34 percent) for exploring an out-of-court settlement in the future. This may be explicable by the fact that many of the women respondents were embroiled in divorce, custody, or other marital disputes and were skeptical about the neutrality and efficacy of traditional dispute-resolving mechanisms such as *Khandan* (family) and *Biradari* (clan). 37.5 and 43 percent of the uneducated/less educated and more educated respondents respectively displayed such an inclination. 40 and 43.5 percent of the less affluent and more affluent respondents respectively displayed such an inclination.

to continue pursuing a legal remedy" (28); and they were "ill-equipped to fight a legal battle due to lack of experience or legal know how" (19). All of these add up to an aggregate of 300 responses out of the total 312 responses offering reasons for respondent willingness to settle the dispute out of court in the future.[155] What is clearly apparent is fairly widescale respondent dissatisfaction with the court system, which in turn persuades them to be open to the idea of an out-of-court resolution in the future, despite the fact that many of them had been unsuccessful in previous attempts to resolve the matter out of court.

On the other hand, the respondents who had expressed lack of willingness to explore an out-of-court settlement in the future were also asked to explain their reasons and allowed multiple responses. Trust deficit vis-à-vis the legal opponent emerged as a primary concern, since the most common response was that "the legal opponent is untrustworthy and hence a legal verdict is necessary to bring the matter to a close" (48). However, lack of available alternatives was another prominent reason – a close second response in terms of frequency was "a legal remedy is the only way to get a just solution" (46).[156] Personal vendetta due to a sense of being wronged motivated the third most common response, "the legal opponent needs to be taught a lesson through a court case" (39), thus highlighting the respondents' perception of embroilment in litigation as a punishment for the opponents. Significantly, only eight respondents mentioned any positive reasons for staying with the formal legal system for dispute resolution, mentioning that they were "satisfied with the experience of pursuing a legal remedy so far" (three), or that they had "faith in the fairness of the court system" (five). All the rest of the responses were either motivated by an apprehension of the failure of future attempts at reconciliation due to a trust deficit; the lack of availability, efficacy, or fairness of out-of-court dispute resolution mechanisms; or a resolve to teach the legal opponent a lesson through embroilment in a court case. Some of the respondents also said that it was rather late in the day to contemplate an out-of-court solution as they had already invested considerable effort and financial resources in litigation (11).

[155] Even the majority of the remaining 12 responses highlighted other elements of respondent dissatisfaction with the court system.

[156] Some of the other responses also highlighted that lack of other viable alternatives had forced a resort to courts, such as "no viable mechanism available for reaching a fair out of court settlement" (12) and "no viable mechanism available for ensuring compliance of parties with an out of court settlement" (8).

Experience of non-court dispute resolution mechanisms

Like other post-colonial societies, Pakistan has a long provenance of various kinds of informal non-state dispute resolution mechanisms and popular justice. However, "popular justice" is not a phenomenon that can be compartmentalized as exclusively post-colonial or as a special idiosyncrasy of developing countries. Sally Engle Merry has, for instance, categorized and documented a wide variety of forms of "popular justice" in highly diverse locations all over the world.[157] She highlights the "basic temporality" and "historically formed and changing quality" of popular justice in contrast to the much greater continuity and stability of the formal legal system.[158] She also brings out the paradoxical nature of the "use" of popular justice – it can and has served at times as part of a government strategy to make the state more accessible and to promote "law and order" by extending state authority to regions and fields previously unregulated by the state. However, it has also frequently been a form of protest against the state and its legal system by the "subordinate, disadvantaged, or marginalized groups," as "a counter legal order," or as more "spontaneous acts of collective judging and violence."[159]

Thus, "popular justice" can be described "as a judicial institution located on the boundary between local ordering and state law with ambiguous and shifting relations to each."[160] It is distinct from both but linked to each; although in cultural terms it is "similar to indigenous law and opposite to state law."[161] The underlying *raison d'être* for

[157] S. E. Merry, "Sorting Out Popular Justice" in *The Possibility of Popular Justice: A Case Study of Community Mediation in the United States* (Ann Arbor: University of Michigan Press, 1993). Merry categorizes them as: "reformist" (that seek to increase the efficiency of the formal legal system through streamlining it and enhancing its accessibility); "socialist" (inspired by Marxist–Leninist theories about the potential of popular tribunals to empower the masses to deal with rule-breaking and to educate them in the forms of a new socialist society); "communitarian" (inspired by attempts to operate entirely outside the state and its institutions and maintain a separate social order and moral code, and at times to create a new religious or utopian social order); and "anarchic" (in which popular justice takes the form of mass uprisings in which ad hoc groups assume the power to judge and punish outside the state legal system, while at times taking on the forms and language of state law to oppose it) (pp. 40–9).

[158] Merry, "Sorting Out Popular Justice," p. 31.

[159] Merry, "Sorting Out Popular Justice," p. 31.

[160] Merry, "Sorting Out Popular Justice," p. 32.

[161] Merry, "Sorting Out Popular Justice," p. 35. It does have certain characteristic features though, such as: it is "relatively informal in ritual and decorum"; it is "non-professional in language and personnel"; it is more "local in scope" and "limited in jurisdiction"; and

"popular justice" is to provide greater accessibility to the common person in terms of intelligibility, cost (both money and time), and proximity. As a result, it has greater attraction for and is predominantly used by the more vulnerable and disadvantaged – i.e. "the urban poor, rural peasants, the working class, minorities, women," rather than the elites who prefer the formal legal system.[162]

To my mind, Sally Engle Merry's most poignant insight is that "the space of popular justice, between state law and indigenous ordering, is a contested space."[163] This contestation and pull between the two orderings causes popular justice to change shape and meaning over time. As a result, "although popular justice is often pulled under the control of state law, new forms of popular justice based on local, non state forms of ordering continually arise and challenge state law."[164] Furthermore, the "context waxes and wanes through processes of reform, counter reform, bureaucratization, decentralization, informalism, refusal to keep records, refusal to participate, and user preference for state law."[165] What is also important to recognize is that in all these traditions, "the creation of popular justice is associated with a political agenda and the vision of some form of social transformation and is supported by particular class interests."[166] Very importantly, "popular justice introduces a new ideology of conflict resolution based on nonviolence and opposition to violence of law."[167] Most of its forms have "a commitment to consensual, amicable resolution of conflicts."[168] Whether it can transform power relations or not, one has to acknowledge that it is "ideologically powerful in its capacity to imagine a nonviolent ideology of managing conflict."[169] As an existing reality; as a proposed substitute; as a component of possible complex hybrids of the formal and the informal; as an

it more typically applies "local standards and rules" and employs "commonsense forms of reasoning" rather than the state law (p. 32).

[162] Merry, "Sorting Out Popular Justice," p. 33.

[163] Merry, "Sorting Out Popular Justice," p. 60.

[164] Merry, "Sorting Out Popular Justice," p. 60.

[165] Merry, "Sorting Out Popular Justice," p. 61.

[166] Merry, "Sorting Out Popular Justice," p. 61. In contexts where the more radical forms of popular justice have been "colonized" and "domesticated," reformist popular justice paradoxically has greater potential for social transformation through its use of a "hegemonic liberal legal order" than anarchic popular justice pursuing more revolutionary aims (p. 62).

[167] Merry, "Sorting Out Popular Justice," p. 62.

[168] Merry, "Sorting Out Popular Justice," p. 62.

[169] Merry, "Sorting Out Popular Justice," p. 62.

indictment of status quo; and as an insight into what people really want from a justice system, modes of "popular justice" in a society merit close examination. Ignoring "popular justice" neither makes it go away, nor does it extinguish the deeper societal discontentment and disharmony that the formal legal system fails to address. This makes it necessary to further understand whether and how a gap can exist between popular aspirations and official judicial dispensations. Furthermore, it is vital to appreciate how modes of popular justice and alternative dispute resolution attempt to fill the gap between peoples' actual "legal experience" and their "legal consciousness."

Therefore, quite apart from developing an empirical understanding of the various dimensions of the average Pakistani citizens' interactions with the formal legal/court system, the Lahore Survey also attempted to document their experiences and perceptions of the available non-court dispute resolution mechanisms and modes of popular justice. It also probed their reasons for not exploring them or initially exploring them, but eventually abandoning the same in favor of the courts. Qualitative feedback generated by the Lahore Survey divulged important information about the reasons behind citizen preference or lack thereof for non-court dispute resolution mechanisms, as well as, in case they preferred the non-court dispute resolution mechanisms, the reasons for not being able to successfully utilize the same. A fair number of respondents expressed both a preference for non-court dispute resolution mechanisms and non-preference for the courts by pointing out frivolous, coercive, or illegitimate use of the latter. According to one respondent: "If non-court dispute resolution mechanisms were strong people would never choose to come to the courts."[170] Another respondent was of the view that: "Legitimate disputes get resolved out of court. The rest come to court."[171]

At the same time, many reasons were offered as to why quite a few of the respondents thought that the non-court dispute resolution mechanisms in Pakistani society no longer worked. The breakdown of traditional social and normative structures was frequently pointed out as the main contributory reason for the ineffectiveness of these mechanisms. In the words of one of the respondents: "Out of court mechanisms don't work as there is no respect left for the elders. We are living in the age of the

[170] Interview with Respondent No. 24, December 20, 2010.
[171] Interview with Respondent No. 249, January 3, 2011.

breakdown of the social fabric and ethical frameworks."[172] Another respondent had similar views: "The elders no longer agree to try and resolve peoples' disputes as no one listens to them anymore. People are much more antagonistic in what is an era of selfishness, materialism and anarchy. God should save everyone from doctors and lawyers."[173] Another interviewee highlighted why certain non-court mechanisms in the Pakistani context found it very difficult to implement their decisions: "Times have changed. Social ostracization, community pressure and public disrepute can no longer be exercised by the *biradari* (clan) against those who transgress other peoples' rights."[174] The resulting lack of implementation of decisions was identified as the primary reason why many people had stopped resorting to non-court dispute resolution mechanisms, as articulated by one respondent: "When someone does not listen to an out of court dispute resolution mechanism's decision, there is simply nothing that one can do about it."[175] Another respondent offered a seemingly different explanation, but it too pointed to the difficulties of making contesting parties abide by the decisions of non-court dispute resolution mechanisms. According to him: "When parties are of unequal resourcefulness, out of court mechanisms don't work as the powerful are least bothered and can easily ignore adverse decisions."[176]

While the above feedback dwelt on the apparent decline of non-court mechanisms, a strong sense of nostalgia pervaded other interviewees' responses – who felt that some of the currently dysfunctional non-court dispute resolution mechanisms had presented many advantages in the past. One of them said, "The media has propagated a very negative and unfair image of *panchayats*. They had a lot of advantages."[177] Another proposed, "Non-court settlements should be made more systematic and binding. The Pakistani legal and court systems are very complex and they have far too many unnecessary formalities and flaws that are used for creating delays."[178] Yet another proposal was that: "Young women have gotten it into their minds that courts provide them better protection. That is why they no longer agree to resolve their disputes out of court.

[172] Interview with Respondent No. 371, January 6, 2011.
[173] Interview with Respondent No. 375, January 6, 2011.
[174] Interview with Respondent No. 399, January 7, 2011.
[175] Interview with Respondent No. 374, January 6, 2011.
[176] Interview with Respondent No. 284, January 4, 2011.
[177] Interview with Respondent No. 365, January 6, 2011.
[178] Interview with Respondent No. 25, December 20, 2010.

Courts should be closed down and *sharia* should be introduced instead."[179] However, there were also quite a few respondents who looked upon the non-court dispute resolution mechanisms, especially the more traditional ones, with a much more critical eye. One female respondent's take on the *Panchayat* was that: "Panchayats don't listen to women. That is why coming to the court is preferable for us."[180] Another female respondent said, "Child custody disputes are very sensitive issues and one can't take the risk of going to non-court mechanisms. Female judges are more understanding and make humane decisions."[181] A third group of respondents was equally skeptical about the independence and fairness of both the courts and the non-court mechanisms. According to them, the principle of "might is right" almost always applied regardless of whether one tried to resolve the matter in or out of court. According to a female respondent, "Women are always suppressed, whether in the court or outside the court."[182] Others, after pointing out the shortcomings of the courts, went on to say, "One can't hope for fairness even outside the courts. There too, it is a case of "*Jiss ki laathi uss ki bhains*" (a common saying in Urdu which literally means that whoever has a large stick owns the cattle).[183]

Quite apart from the disintegration of the traditional modes of dispute resolution in the Punjab such as *Khandan* (family), *Panchayat* (council of elders), and *Biradari* (clan), some respondents also reported a breakdown of more modern mechanisms for dispute resolution, such as market and traders' unions. According to one litigant contesting a commercial dispute: "Market/traders' unions used to be an effective forum for commercial dispute resolution. Now, even they are dominated by capitalists who are backed by criminals. They are increasingly a failing mechanism and are indifferent to resolving the commercial disputes of the business community."[184] Others pointed out that in disputes with a government department, one always ended up in court: "In any dispute with the government, the government always goes to court and it wastes a lot of time. There should really be a mechanism

[179] Interview with Respondent No. 329, January 6, 2011.
[180] Interview with Respondent No. 388, January 7, 2011.
[181] Interview with Respondent No. 65, December 21, 2010.
[182] Interview with Respondent No. 261, January 3, 2011.
[183] Interviews with Respondent No. 376, January 6, 2011; Respondent No. 310, January 6, 2011; and Respondent No. 420, January 7, 2011. All three interviewees said more or less the same thing.
[184] Interview with Respondent No. 3, December 20, 2010.

for resolving such issues through an officially designated third party that employs a much quicker process."[185]

Moving on to the quantitative data, the Lahore Survey posed the respondents a general question regarding their knowledge about the existence of non-court dispute resolution mechanisms that resolved disputes similar to their own. A vast proportion of the respondents (66.5 percent) replied in the affirmative and reported that disputes similar to their own continued to be resolved by various out-of-court dispute settlement mechanisms. Around 11 percent stated that they no longer knew whether that was the case. The remaining respondents, who had said that at least disputes similar to their own were no longer resolved by non-court mechanisms (22.5 percent), were then asked which kinds of disputes they thought were resolved through non-court dispute resolution mechanisms. They were allowed multiple responses. Marital, family, inheritance, agricultural land, child custody, and commercial property disputes emerged as the most popular responses to this question. A number of interviewees (28) were skeptical that any disputes actually got resolved out of court any more. At the same time, there were also many who felt that all disputes could be resolved out of court provided the disputing parties were willing to do so (42). All the respondents were then asked about the most popular existing modes of non-court dispute resolution in society and multiple responses were allowed. *Khandan* (Extended Family) (198), *Panchayat* (Council of Elders) (131),[186] other local influential people (119), *Mohalla* (Neighborhood) (117), *Biradari* (Clan) (116), and local bureaucracy (76)[187] emerged by far as the most popular responses. At the same time, it is also important to note the reported role of some local power groups as well as state functionaries, such as the *Village Chaudhry/Malik* (local large landowners) (34), district bureaucracy (27), and *Dharras* (political groupings/vote banks) (19). Interestingly, some of the respondents also divulged the role played by local crime lords (25), private dispute resolution mechanisms for which a fee is charged (14), and even local police (12).

[185] Interview with Respondent No. 53, December 21, 2010.

[186] These included the traditional Village Panchayats (council of village elders), as well as modified urban versions involving a group of local elders and/or notables appointed to resolve disputes on an ad hoc or ongoing basis.

[187] This category included, inter alia, *Patwaris* (land record keepers); *Nambardars* (village headmen); *Tehsildars* (tehsil administration/revenue collection heads), union council members, etc.

Given popular perceptions about the police meddling in or playing the role of power broker in civil disputes, the respondents were also specifically asked if the police played any role in resolving civil disputes. While just over half of them responded in the negative (52 percent), the remainder either acknowledged that it played a role (15 percent), expressed lack of knowledge (17.5 percent), or accused the police of not only meddling in civil disputes, but exercising coercion in favor of one of the parties upon being bribed by the same (12.5 percent). Some of them even reported direct experience of being harassed by the police at the behest of their opponents (3 percent). The less affluent respondents more frequently reported harassment by the police – the bulk of the responses generally accusing the police of coercion (66.5 percent of such responses) or reporting direct experience of police harassment (84.5 percent of such responses) emanated from the two lowest income categories.

Respondents were then asked about the most typical decisions by non-court dispute resolution mechanisms, and multiple responses were allowed. "Settlement of financial claims" (207) and "settlement of other non-financial disputes" (127) emerged as the most frequent responses. Many respondents, however, could not come up with a response to this question (150). Normative social pressure in the form of "public chastisement and demand for apology" (38) and "social ostracization for a given period of time" (8) were comparatively infrequent responses.[188] The respondents were further asked about the mode of implementation of the decisions of non-court dispute resolution mechanisms. The most popular response was that non-court dispute resolution mechanisms did not have a mode of implementation (43.5 percent), followed by the response that the interviewee did not know about the mode of implementation of such mechanisms (31.5 percent). Taken together, these constitute three-quarters of the responses (75 percent). The most common responses that revealed the actual existence of a mode of implementation for decisions of non-court dispute resolution mechanisms were "social/community pressure and disrepute" (16 percent), and "social ostracization" (2.5 percent).[189] So while a fairly large number of respondents indicated that non-court dispute resolution mechanisms

[188] The remaining responses were: financial penalties (38); physical punishment (6); and physical confinement (2).

[189] Furthermore, "threat of violence/actual violence" was also mentioned by 2.5 percent and "financial penalties" by 1 percent of the respondents.

continued to be utilized for both financial and non-financial disputes, relatively few respondents pointed out any societal or community-based implementation methods at the disposal of these non-court mechanisms. Both this feedback and the general conversations with the respondents revealed that these mechanisms only worked to the extent that the contesting parties were willing to abide by their decisions. While their decisions had no legally binding value in court, they also did not have any great normative support and persuasive value due to community or social pressure when it came to actual implementation.[190]

The respondents were also asked whether people willingly referred their disputes to non-court-based dispute resolution mechanisms. An aggregate of about one-third (30 percent) of the respondents said that coercion was a factor most of the time (5.5 percent), or that it was a factor sometimes (24.5 percent). However, a greater number of respondents (48 percent) reported that coercion did not play a role and that people willingly forwarded their disputes to non-court dispute resolution mechanisms. A sizable chunk of the respondents also said that they did not know the answer to this question (22 percent).[191] The respondents who had said that coercion played a role were asked who in their view employed such coercion. The most popular response to this question was that it was "one of the disputing parties" (85). Social mechanisms or organizations did not figure very prominently in the feedback as the coercers, although "*Khandan*" (38) and "other local influential people" (32) were mentioned more prominently than other options for the response.[192]

In order to gauge which kinds of disputes invariably ended up in courts, the respondents were also asked about the kinds of disputes which were not taken to non-court dispute resolution mechanisms and allowed multiple responses. Property disputes (agricultural, residential, and

[190] According to some respondents, the most that could happen was that the party in whose favor a decision was given benefited from the assistance and support (sometimes as witnesses) of those who had resolved the dispute, in the subsequent court battle if his or her opponent decided to take the matter to court.

[191] Given that a greater proportion of the respondents had expressed lack of knowledge/information in response to earlier questions about non-court dispute resolution mechanisms, it is likely that responses reporting coercion or absence of coercion here are somewhat colored by the personal preferences/biases of the respondents for or against non-court dispute resolution mechanisms.

[192] The next five prominent responses are: *Biradari* (17); local large landowner (17); local bureaucracy (15); *Village Panchayat* (14); and local police (10).

commercial) figured prominently in these responses. At the same time, it is significant that the most frequent response to this question was that, "all disputes can get settled out of court if the parties are willing" (144). The respondents were further probed for the reasons why certain kinds of disputes were not taken to non-court dispute resolution mechanisms, and allowed multiple responses. The most frequently quoted reason was that, "such mechanisms have no powers to enforce their decisions" (118). It is interesting to see that the most popular response is essentially value neutral. It has no negative connotation vis-à-vis the actual fairness or efficiency of operation of the non-court mechanisms. Thus, this can plausibly be interpreted to mean that if the non-court mechanisms were able to more effectively implement their decisions, people would probably prefer using them over courts. However, the second and third most frequent comments – that "people don't have faith in the capacity and efficiency of such mechanisms" (104) and "these mechanisms are vulnerable to private pressure and influence" (89) – identified problems with the capacity, efficiency, and integrity of existing non-court mechanisms. The fourth most frequent comment – that "no such viable mechanisms currently exist" (49) – is once again value neutral. However, the fifth most frequent comment – that "influential people feel more confident of manipulating the formal legal/court system" (39) – actually reveals the perception that courts are more amenable to being manipulated by the powerful. Nevertheless, a more or less equal number of respondents also said that, "weaker parties feel more empowered by the formal legal/court system" (37). In addition to this, some respondents expressed further positive reasons for accessing courts rather than non-court systems. For instance, there were comments such as "people have greater faith in the fairness of the court system" (13) and "the court system is more easily accessible" (11).

The focus of the Lahore Survey then shifted to the litigants' direct experience, if any, of using non-court dispute resolution mechanisms. They were asked if they had explored any such alternatives before coming to court. More than half the respondents (53.5 percent) replied in the affirmative. The less affluent respondents divulged a greater propensity to explore non-court dispute resolution before approaching or ending up in court (57.5 percent), as compared to the more affluent respondents (47 percent). Those who divulged that they had indeed explored non-court dispute resolution mechanisms were then asked to identify the mechanisms and allowed multiple responses. *Khandan*

(extended family) (114), *Mohalla* (neighborhood) (49), other local influential people (42), *Biradari* (clan) (40), *Panchayat* (village council of elders as well as urban council of elders) (36), and local bureaucracy (24) were the most frequent responses.

The respondents who had explored non-court dispute resolution mechanisms before coming to court were then asked about the outcome of such exploration and allowed multiple responses. The most common response was that they had found such mechanisms to be "inefficient or dysfunctional" (111). Lack of capacity for implementation of decisions came across as the next most frequently cited reason, with quite a few respondents saying either that the mechanism "came up with a fair outcome but had none or weak implementation" (71) or that the mechanism "came up with a fair outcome but their legal opponent disregarded it and went to court" (43). This further augments the earlier finding that one of the primary grievances voiced by the Lahore Survey respondents about non-court dispute resolution mechanisms was the lack of implementation mechanisms for their decisions. However, it should also be noted that a certain section pointed out more substantive issues, such as that: the mechanism "was influenced by the legal opponent and came up with an unfair outcome" (28); it was "biased to start with" (25); it "came up with an unjust outcome" (15); or "it followed a flawed or unfair process" (13).

On the other hand, the respondents who had said that they had not explored non-court dispute resolution mechanisms before coming to court were asked why they had not explored the same and allowed multiple responses. Slightly differently worded questions with different possible response choices were devised for the petitioners and the respondents in this subset of the sample, as the possible reasons of these two groups were expected to be different from each other. In the case of the petitioners, many of them said of their particular disputes that "such matters always go to courts as a matter of common practice" (54), or that "the law requires a court process for seeking a remedy in such cases" (30). Others, however, professed a "lack of faith in the effectiveness and efficiency of non-court dispute resolution mechanisms" (32), or once again bemoaned "the absence of implementation mechanisms for the decisions of non-court dispute resolution mechanisms" (29). Thus, lack of "effectiveness," "efficiency," and "implementation mechanisms" once again emerged as prominent reasons as to why such non-court mechanisms had not been explored and petitioners had resorted to the courts

instead. Very few responses opted for a justification for non-exploration of such mechanisms that actually indicated greater faith and confidence in the speed, quality, or superiority of court-based justice, such as "greater faith in the impartiality and effectiveness of courts" (3), or that "the dispute is too complicated or technical for a non-court dispute resolution mechanism to resolve" (12).

The respondents were also asked the same question and allowed multiple responses. This time the most popular response was that the "petitioner left the respondent no choice as he/she was unwilling to explore non-court dispute resolution mechanisms" (35), followed by "the petitioner has a weak or frivolous case and felt that going to court would be an effective strategy for embroiling the petitioner in legal troubles" (19). These responses essentially reveal regret at not having been able to explore non-court dispute resolution and resentment at having been taken to court instead.[193]

On the whole, one of the most important insights emerging from this feedback is that while many respondents pointed out several limitations of non-court dispute resolution mechanisms, a fairly large number of the respondents were also of the view that if these mechanisms were mutually acceptable to the disputing parties and/or such mechanisms had an effective mode for implementing their decisions, they would preclude many disputes from coming to court. In the absence of effective implementation mechanisms and/or strong normative frameworks in society mandating compliance with their decisions, their viability and success turned out to be solely dependent on the goodwill and good faith of the contesting parties. That, it transpired, was seldom on offer. More or less anyone who was unhappy with their decisions – regardless of their merit, the rigor of the decision-making process, and wider community/societal support for the fairness of their outcome – could, it seems, almost always disregard these decisions without any compunction or adverse consequences, and initiate litigation instead. At the same time, in other instances, neither of the disputing parties even considered the possibility

[193] These sentiments are also reflected in some of the other comments, such as: "There is really no real dispute and the court case is actually being used for coercion or to settle scores" (7); "the petitioner is vindictive or has a grudge and wanted to embroil the respondent in legal troubles" (6); "the petitioner is influential and resourceful and felt confident that he would get a legal verdict in his favour" (3); and "the petitioner did explore local non-court dispute resolution mechanism but was unhappy with the unfavorable outcome" (2).

of exploring any such mechanisms knowing that the other party could conveniently go to court if it was unhappy with the outcome of the non-court dispute resolution – thus eroding any advantage whatsoever for the party that explored a non-court solution, and invested time and effort toward that end. This serious drawback is echoed in the words of one of the respondents: "One of the disputing parties always resorts to the courts, even when you try and resolve the matter out of court. So it makes sense to start one's contestation from the court itself."[194] Thus, a milieu emerges where going to court almost always makes sense, even if in some cases the underlying intent is to eventually settle out of court.

Once litigation commences, there may be multiple reasons why the disputing parties may not reconsider exploring a non-court solution. As one respondent shared: "The reason why I am persisting with this litigation is because I want to confront my opponent with the fake documents he has forged and look him eye to eye and talk face to face."[195] Another reason voiced was as follows: "Now that I have spent all this money on litigation I will only settle for a court verdict. Initially when my opponent approached me to settle the matter out of court he demanded Rs. 300,000 in lieu of vacating my house which he has occupied. Now he is even ready to do the same for Rs. 20,000 but why should I settle after all this litigation?"[196] For others, lack of alternatives seemed to have left no choice but to persist with the courts, even if the latter alternative was odious to them. One female respondent broke down: "I don't like coming to the court. Who wants to come to court and sit amongst so many strange men? I come all the way from the border area. Why should I have to come from such a distance? Whenever I come to the court, I go back home crying."[197] An older male respondent confided: "No respectable person wants to come to court. People come as a last resort when all else fails."[198] The burden was all the more onerous for anyone facing a physical debilitation. One frail-looking respondent shared the following: "I have several health issues. With my state of health and my constantly having to come to court and observing no progress in my case, my life is simply torture."[199]

[194] Interview with Respondent No. 220, January 3, 2011.
[195] Interview with Respondent No. 274, January 4, 2011.
[196] Interview with Respondent No. 341, January 6, 2011.
[197] Interview with Respondent No. 342, January 6, 2011.
[198] Interview with Respondent No. 260, January 3, 2011.
[199] Interview with Respondent No. 122, January 23, 2011.

Future choices

Given the sensitivity of some of the respondents to certain direct questions, toward the end of the Lahore Survey the respondents were indirectly asked to list what they felt were the main impediments they confronted while pursuing their legal battles.[200] "Cost of litigation" (200) emerged as the most frequently mentioned impediment. This was followed by "attitude of lawyers" (166), "complexity of legal system" (152), "corruption" (143), "judicial attitudes" (141) and "distance of the court from home" (135). All of these responses were each given by more than 100 respondents. The other two most popular responses were "constant shifting/transfer of judges" (97) and "language" (83). Other significant responses were "attitude of court staff" (52), "strikes by lawyers" (43) and "discrimination and/or intimidation on the basis of caste, clan, class, gender, religion, ethnicity, sect etc." (23).[201]

Finally, in view of all the above feedback, the Lahore Survey asked the respondents whether they would revert to a court-based solution if confronted with a similar dispute or problem in future. A significant percentage (42 percent) of the respondents replied in the negative. Another 10 percent said that they were unsure as to what they would do. The remaining 48 percent said that even in the future they would bring any similar disputes to court. Thus, more than half of those who took part in the Lahore Survey were sure that they would not come to court again, or were unsure as to what they would do. A greater proportion of the male respondents and the more educated respondents ruled out the courts as the venue of choice for future dispute resolution. At the

[200] They were not provided any prompts or suggestions and their spontaneous responses were ticked off on the list of possible responses in the questionnaire. If any interviewee was unclear about the question, he or she was read out the entire list of possible answers and also urged to give any responses that may fall outside the list, but which he or she thought were important. Interviewees were also allowed multiple responses.

[201] There were quite a few respondents whose frank comments exposed the ineffectualness of the Lahore High Court's oversight of the performance of the Lahore District Courts and also the vacuousness of the Supreme Court of Pakistan's oft-stated commitment to expedite cases, reduce case backlog, and cut down on delays in the country's district courts. These comments also unraveled the inefficacy of a high-profile district court performance monitoring mechanism established by the High Courts. According to one respondent: "I wrote many letters to the Chief Justice to expedite my case. He has issued directions to the district judges on several occasions and directed the District & Sessions Judge, Lahore to decide my case within 1 month but these directions have been completely disregarded" (Interview with Respondent No. 3, December 20, 2010).

same time, the less educated and less affluent respondents were proportionately less certain about their future course of action if faced with a similar dispute.[202]

Respondents who said that they would not bring a similar dispute to the court in future were asked where they would go instead in order to resolve their disputes and allowed multiple responses. "*Khandan*" (family) (74), "*Mohalla*" (neighborhood) (44), "*Biradari*" (33), "*Panchayat*" (26), "local influential people" (26), "local large landowner" (14), and "local bureaucracy" (14) were the most common responses.

Focusing then on the aforementioned 48 percent of the overall respondents who had said that they would bring similar disputes to the courts in future, the Lahore Survey sought their reasons for their preference for the courts.[203] As it turned out, their overall responses clearly dispelled the possibility that these respondents saw some inherent merit in or innate advantage associated with the courts. Remarkably, a mere 16 percent of respondents said that they would come back to the courts with any future disputes because they were satisfied with them, while a negligible number (1 percent) said that they would opt for the courts in future as they provided a cheaper dispute resolution option. On the other hand, a resounding 77 percent of these respondents turned out to be dissatisfied with the courts – their only reason for resorting to the courts with any

[202] 54 and 46 percent of the male and female respondents respectively said they would not come to court in future or were unsure as to their future course of action. 43 and 39.5 percent of the more educated and uneducated/less educated respondents respectively said they would not come to court in the future. However, only 8 percent of the more educated respondents were unsure as to what they would do in future, as compared to 13 percent of the uneducated or less educated respondents. Significantly, more than half of the uneducated respondents (51 percent) said that they would not come to court or were unsure as to their future course of action if faced with a similar dispute. Also, one-quarter of the respondents who said they were unsure as to future choices were uneducated. On the other hand, only 3 percent of the respondents with some level of college education were unsure as to their future course of action. 52.5 percent of the respondents falling in the two lowest income categories said they would not go to court if faced with such a problem in the future, or that they were unsure about their future course of action, as compared to 50.5 percent of the respondents in all the higher income categories. However, 13 percent of the respondents in the two lowest income categories said that they were unsure about their future course of action, as compared to only 5 percent of the respondents in all the higher income categories.

[203] A total of 224 respondents responded to this question, even though only 213 had answered "Yes" when asked if they would come to the courts again. The reason in all probability is that some of the respondents who had said "don't know" to the earlier question decided that they wanted to answer this question in order to better communicate what contributed to their predicament of uncertainty.

future disputes was that they felt that there were simply no other viable alternative dispute resolution mechanisms. The more educated and more affluent respondents were proportionately more categorical about their dissatisfaction with the courts, but the level of dissatisfaction was also fairly high among the less educated and less affluent respondents.[204]

In summation, 42 percent of all the Lahore Survey respondents said that they would not like to bring their disputes to the courts in future, owing to their dissatisfaction with their current experiences. Another 39.5 percent of all respondents said that they were dissatisfied with the courts' performance, and hence their only reason for thinking about bringing future disputes to the courts was the lack of any viable alternative dispute resolution options. The overall magnitude of those dissatisfied with the formal court system was thus well over three-quarters (81.5 percent) of the 440 randomly selected litigants in the Lahore Litigants' Study. Thus, the clear big picture is one of vast prevalent dissatisfaction with the operation of the Pakistani formal court system. These statistics are also quite a serious exposé of various official claims that the performance of the courts of first instance has actually improved. Indeed, it is also an exposé of the near absence of any tangible positive impact of the various justice sector reform programs in Pakistan over the past decade-and-a-half, to which I shall turn in later chapters.

Conclusions

The Lahore Litigants' Study underlines the fact that when Pakistani disputants/litigants approach the formal court system, they bring with them various levels of existing and entrenched disenfranchisement and disempowerment, which are at times fairly acute and debilitating. The milieu with which they are faced when they interact with the legal and court system, however, is not one where there is much evidence of any

[204] Almost three-quarters (72 percent) of the uneducated or less educated respondents expressed their dissatisfaction with the courts, as compared to an even higher 80 percent of the more educated respondents. 19 percent of the uneducated/less educated respondents said that they would come back to the courts as they were satisfied with them, as compared to an even lower 14.5 percent of the more educated respondents. Furthermore, three-quarters (74.5 percent) of the respondents in the two lowest income categories expressed their dissatisfaction with the courts, as compared to an even higher 81.5 percent of the more affluent respondents. Only 18 percent of the lowest income respondents said that they would opt to come to the courts in the future as they were satisfied with them, as compared to an even lower 13 percent of the more affluent respondents.

official institutional, structural, and substantive attempts to somehow level the playing field. Instead, the current forms, structure, and culture of the extant system exacerbate the unevenness of the playing field. They cause it to be even more lopsided, unfair, and disadvantageous for the already disempowered and vulnerable. The most obvious piece of evidence to support this contention is the disempowerment created and accentuated by the primary and prevalent language of the Pakistani legal system and of its courts.

Published in 1925, Franz Kafka's brilliant *The Trial* explores the horror and hopelessness of an inaccessible, unintelligible, and unknowable legal system. A significant sub-theme deals with a slavish dependence on legal counsels to stay afloat in such a system – an oppressive reliance brought about by the clients' ignorance. *The Trial* was never completed. One sometimes wonders what Kafka would have made of a post-colonial context where the predominant majority of litigants don't even understand the language in which their laws, rules, regulations, and court judgments are written. Language is the most obvious divider of Pakistani society into two distinct classes – there are those who are proficient, at an advantage, and hence empowered, and then there are all the rest. The situation that emerges from the Lahore Survey results is one of stark alienation from the legal and court system for those who do not understand English. As a corollary, they have no opportunity whatsoever for first-hand comprehension of their legal rights and remedies, and thereby for effectively monitoring the progress of their legal cases and the performance of their lawyers. They are not much different from deaf and dumb spectators in the undecipherable spectacle of the courts which decide the outcomes of their legal disputes and, in many cases, the trajectories for the rest of their lives and those of their families and dependants. One is left with the lasting image of hundreds of thousands of Pakistanis engaging in guesswork as they mutely wait outside courtrooms abuzz with an incomprehensible language.

The alienation caused by English aside, the near-absence and failure of any attempts to inform, facilitate, and empower the average citizen through provision of fundamental legal education, rights awareness, translations of laws/regulations/processes in local languages, and free legal aid is clear in several other significant ways. A few years ago, some efforts were made to redress the balance in the interim – information kiosks in courts, publication of simplified Urdu versions of laws, legal literacy, rights advocacy campaigns through media, and citizen-court liaison committees were some of the initiatives briefly pursued. Once

international donor money ran out, so it seems did the national commitment. Any leftover funds remain largely unutilized.

Many of the respondents were not even able to comprehend the archaic and highly technical Urdu that is used for some legal court documentation and processes. They report complete incomprehension or at best partial understanding of the legal and court processes, as well as their rights and remedies under the law. Their overall general as well as legal illiteracy is accentuated by the fact that many of the respondents have no past litigation experience upon which they can draw; they also have no recourse to resource persons who are knowledgeable in legal and court processes. Furthermore, almost no one has ever heard of a free legal aid scheme for vulnerable or disadvantaged litigants, let alone accessed it. The Lahore Survey results make it abundantly evident that a comparative advantage in knowledge-based empowerment and consequently legal capacity, leverage, and effectiveness is clearly a function (in the Lahore district) of, inter alia, the respondents' education and economic status. At times, gender, whether the respondent is an urban or a rural dweller, occupation, and social access also become significant factors.

Over 40 percent of the overall respondents are either completely illiterate or have rudimentary schooling; and generally deficient learning, poor quality of teaching, and the educational curriculum lacking any component on constitutional, legal, and civic rights awareness are also reflected in the inadequacies of some of the more educated respondents. This, combined with a near-absence of any reform steps to educate, facilitate, and empower the uneducated or the less educated in the legal and court process, translates into some sobering numbers. More than one-quarter of the Lahore Survey population is clearly much more disadvantaged at several important levels, as compared to the more educated counterparts. Amongst other things, severe handicaps exist in terms of: general comprehension of legal rights and remedies; comprehension of English; specific knowledge and comprehension of law/regulations, court documents, contracts, and legal proceedings in English; comprehension of legal processes and procedures; vulnerability to coercion by legal opponents; past litigation experience; and choices and contacts for selecting legal counsel.

In terms of economic status, the Lahore Survey sample comprises many more comparatively less affluent respondents than affluent ones, which in turn tells us two things. First, the random sample reveals that the courts of first instance are accessed primarily by the less affluent. One may argue that the survey sample did not properly capture the more

affluent litigants because of their physical absence from the court complex as they may be better able to afford more expensive and effective lawyers, making personal appearance unnecessary. Even while acknowledging this possibility, it is an important finding in its own right that those who actually appeared on the radar were poor and less resourceful and had no option but to regularly appear in court for long periods of time in order to personally oversee the fate of their legal contestations. Second, the less affluent respondents were poor in a real and not merely relative sense. Of the respondents, 63 percent lie in monthly income categories of less than or equal to $117 per month and less than or equal to $235 per month. The fact that low monthly income is a significant disempowering variable in a courtroom manifests itself in many different ways, namely in terms of: the additional inconvenience and burdensome cost of travel to the courts; higher exposure to coercion by legal opponents; greater vulnerability to harassment by the police; more frequent, though ultimately unsuccessful, exploration of non-court dispute resolution mechanisms; weaker comprehension of English; less specific comprehension of laws/regulations and court proceedings in English; less past litigation experience; less comprehension of legal processes and procedures; less comprehension of general legal rights and remedies; and more limited choices and contacts for selecting legal counsel. Furthermore, if one compares these monthly incomes to the reported financial outlay on litigation by the respondents, the extent of the financial burden of court-based dispute resolution becomes even more magnified.

The Lahore Survey results also reveal that vast numbers of the respondents are not keen to come back to court for future dispute resolution, or are under compulsion to access courts in the future (despite their dissatisfaction with the same) owing to the absence of any alternatives. The survey results further reveal that many of them made serious attempts at out-of-court settlements and third-party dispute resolutions in order to avoid ending up in court in the first place. At the same time, the minority which would not mind coming back to court in the future rarely mentions any positive reasons for doing so. It thus appears from the Lahore Survey that far too many people are unwillingly ending up in the courts and finding themselves embroiled in extended, expensive, frustrating, and seemingly inconclusive litigation.

The high number of respondents who expressed a willingness to settle out of court in future, those who shared that they had actually explored non-court dispute resolution mechanisms before coming or being brought to the courts, and those who would rather not come to court

in the future for similar disputes, or would only come as there were no alternatives, suggests the obvious. There is palpable public dismay at what are perceived as crumbling social norms and disintegrating normative frameworks, which in turn have made non-court dispute resolution mechanisms dysfunctional and unreliable. It is, therefore, no surprise that litigation is consistently on the rise in Pakistan. Quite apart from the potential of non-court dispute resolution mechanisms to provide more accessible, cheaper, quicker, more intelligible, and more sustainable solutions to citizen disputes, there are several negative externalities of their growing inefficacy and disintegration. Some of the most obvious ones are the increasing court workloads and case delays, distraction of court resources from more appropriate and socially important matters for court adjudication to all kinds of disputes under the sun, and an escalation of the overall public disenchantment and frustration with the formal legal and judicial system, and hence the state. Some of this frustration has already spilled over into wide-scale violence and rebellion against the state in certain parts of the country. In other places it contributes to consistent erosion of state-enforced order, greater apprehension and incidence of crime, an increasing sense of insecurity, and higher reliance on non-state actors for protection. I turn to some of these important themes in the following chapter.

3

Law, crime, context, and vulnerability: the Punjab Crime Perception Survey (2009–2010)

Objectives of the chapter

Based on the evaluation of the experience of ordinary Pakistani litigants in the District Courts of a major urban center, the previous chapter argued that there is a gap between peoples' actual expectations from and their differential experience with the justice system, which is a function of various levels of social, economic, and political disempowerment and alienation. It also presented evidence to suggest that the extant legal and court systems exacerbate these problems of disempowerment and alienation in significant ways. Taking these arguments forward, and employing once again a socio-legal perspective, this chapter endeavors to further broaden the scope of analysis conducted so far and explore additional relevant themes in order to better appreciate popular experience with the Pakistani formal legal system.

While the previous chapter provided a snapshot of litigant experience with the civil justice system, the present chapter's focal point is citizens' experience with and perception of important aspects of the Pakistani criminal justice system. Quite apart from actual expectations and differential experiences, Pakistani citizens across its highly diverse politico-economic landscape and divergent socio-cultural milieus also have very different perceptions of the criminal justice system – a corollary of having differential experience. This in turn persuades them to interact with or agitate against the state in different ways. In certain instances, such experiences and perceptions, it shall be argued, directly contribute to: an escalating erosion of state-enforced law and order; greater apprehensions of and victimization by crime; a growing collective sense of insecurity; and greater resort to different societal institutions for the security and protection that is ultimately the responsibility of the state to provide and ensure.

One of the factors widely regarded as contributing to differential citizen access to justice and divergent experiences with and perceptions of the Pakistani criminal justice system is the sub-optimal performance, partisanship, and/or lack of cooperation of the Pakistani police and other law enforcement agencies. In turn, these failings of the criminal justice system have direct bearing on the "efficiency" and speed of litigation and judicial decisions and the quality of the outcomes of criminal cases in courts. For victims of crime, the first point of contact with the criminal justice system is the "*thana*" or police station – as also for those who attempt to co-opt the criminal justice system for private coercion.[1] It is at the "*thana*" that the First Information Report (FIR) of a crime is reported and registered; a police investigation is initiated and proceeds; and a "*Challan*" (formal indictment) is prepared in order to bring the matter before a magistrate. In many ways, whether or not such a process ensues in view of a criminal complaint has important ramifications for legitimate complainants as well as those who are wrongly and/or maliciously accused. These outcomes also directly impact the aforementioned sense of citizen security and their perceptions of the effectiveness of rule of law in the country.

Scope, structure, and research methodology

This chapter vastly broadens the scope of analysis from the District Court of a major urban center to the large and highly diverse province of the Punjab. Thereby, it explores the various endogenous and exogenous, personal and societal, individual and institutional, historical and geographical factors and variables that contribute to differential citizen experiences with and perceptions of certain important aspects of the criminal justice system. It prefaces its empirical discussion by furnishing a snapshot of the administrative history and political economy of the Punjab, with particular focus on colonial land

[1] The police station is the lowest independent office and first point of contact in the Punjab Police (policing is a provincial subject under the Pakistani Constitution). A crime can only be registered with a police station within the precincts of which it takes place. The police stations bear the main responsibility for crime prevention and investigation. Some police stations, usually those with large territorial jurisdictions, also have one or more police posts. There are currently 648 police stations and 200 police posts in the Punjab. See Bureau of Statistics, *Government of the Punjab* (Lahore: Bureau of Statistics, Planning & Development Department, Government of the Punjab, 2008), p. 14.

settlement and administration policies and practice. It argues that the colonization of the Punjab, the consequent patterns of social engineering, and its unique agrarian administration have had a lasting imprint on its contemporary political and economic power structures, its asymmetric land relationships, and the Punjabi population's accentuating disparity in terms of the levels of legal empowerment. The nexus between access to land and a sense of security or vulnerability vis-à-vis crime is an extensive, significant, and understudied area. This chapter endeavors to highlight the broad contours of the Punjabi landscape of crime and vulnerability, and to explore important aspects of the same. Toward this end, it first captures diverse general perceptions about the prevalence and growth of crime, apprehension of crime, the nature of prevalent crime, and the overall sense of security. It then focuses on the perceptions and experiences of actual crime victims. The analysis then proceeds to determine the nature of citizen experience with the state – specifically the experience of reporting and registering crime with the police and the extent of satisfaction with consequent police investigations. It also gauges citizen propensity to explore non-state solutions over the formal criminal justice system. The chapter concludes with various observations on citizen vulnerabilities in the Punjab, in the context both of their existing socio-economic conditions and the actual and perceived failure of state institutions to prevent and fight crime.

As to methodology, this chapter is based on an extensive household survey of 2,108 households across the Punjab (the "Crime Survey").[2] The Crime Survey was designed to capture the dispersed geographical concentration of Punjabi population in various areas of tremendous social, cultural, and economic diversity. Four tehsils/towns were selected according to the following criteria: (i) socio-economic performance; (ii) geographical location; and (iii) placement on the rural–urban spectrum. They are listed in Table 3.1 below. Table 3.2 provides the precise breakdown of the sample population across the four tehsils/towns, as well as along the rural–urban spectrum. Additional details about the ambit, structure, content, methodology, and actual conduct of the Crime Survey are presented in Appendix 2.

[2] The Crime Survey was sponsored by the Asian Development Bank (ADB). Detailed results and analysis of the Crime Survey are part of a study entitled O. Siddique and S. Anjum, *Punjab Crime Perception Survey Report 2009*, which is available from the ADB (official publication pending).

Table 3.1: *Sample tehsils/towns*

Sample tehsil/town	Socio-economic status Region Demographics
Kehror Pacca	Lower performing Southern Punjab Rural/other urban
Potohar Town	Average performing Northern Punjab Rural
Wazirabad	Higher performing Central Punjab Rural/other urban
Samanabad Town (Lahore)	Average performing Central Punjab Major urban

Table 3.2: *Analysis of sample population*

Tehsil	Major city	Other urban	Rural	Total
Potohar Town	0	0	480	480
Wazirabad	0	228	384	612
Kehror Pacca	0	192	464	656
Lahore	360	0	0	360
Total	360	420	1,328	2,108

The Punjab: population, administrative units, and colonial structures of political economy

According to the population census of 1998, the Punjab's total population at the time was 73.621 million.[3] Its population is estimated to have grown to around 92.089 million by 2009 – it was and remains

[3] Siddique and Anjum, *Punjab Crime Perception Survey Report 2009*, p. 268. It is also estimated that out of this population, 51.7 percent was male and around 68.25 percent resided in rural areas (p. 269). In 1998, the literate population in the Punjab comprised around 46.6 percent of its total population. This is, however, estimated to have increased to 58 percent of the population in 2006. The literacy ratio is estimated to be higher in the

Pakistan's most populous province.[4] For administrative purposes, it is divided into nine divisions, each of which comprises a number of districts, further divided into several tehsils and towns.[5] These administrative units vary significantly in terms of their size, population, and socio-economic indicators. Another way of differentiating the various geographical regions in the Punjab in view of their cultural, linguistic, and socio-economic diversity is to visualize it as divided into three distinct parts, namely: Northern, Central, and Southern Punjab – the latter being the least socio-economically developed area of the province.

Annexed in 1849 by the British, the Punjab was a key province in colonial India. This was initially because it provided the British with the bulk of the loyal native army that played a crucial role in quelling the 1857 "Sepoy Mutiny" – referred to by the citizens of South Asia as the "1857 War of Independence." Post 1857, the civilian loyalists as well as the military recruits and beneficiaries from the Punjab remained significant to colonial rule and military expeditions in India.[6] At the same time, the Punjab served as an arena for extensive agricultural expansion. Revenue extraction consistently remained an important colonial goal and stimulated unique and wide-scale administrative reforms.[7] According to the leading post-colonial scholarship on the colonial history

case of urban population (73 percent) and lower in the case of rural population (50 percent). It also drastically varies with gender – around 67 percent of males were reported to be literate in 2006, as against 48 percent of females (p. 146).

[4] Siddique and Anjum, *Punjab Crime Perception Survey Report 2009*, p. 268.

[5] The total number of districts, tehsils, and towns in the Punjab currently stands at 36, 131, and 38 respectively (Siddique and Anjum, *Punjab Crime Perception Survey Report 2009*, p. 14).

[6] For extensive recent analysis of the vital nexus between colonial military interests and imperatives and its governance of Punjab, see T. Tai Yong, *The Garrison State: The Military, Government and Society in Colonial Punjab, 1849–1947* (New Delhi and Thousand Oaks: Sage/Vanguard, 2005).

[7] The unique ethos and flavor of colonial administration in Punjab has been described as "The Punjab School of Administration." For a succinct discussion of the same, see I. Talbot, "British Rule in the Punjab: 1845–1947: Characteristics and Consequences," *Journal of Imperial and Commonwealth History*, 19(2) (1991), 203. Unlike the older provinces in India, Punjab was a "non-regulation" province with "a form of government that emphasized dynamic administrative flexibility over 'rigid adherence to administrative regulations' and which became the basis of the paternalistic despotism that was to characterize the famed Punjab school of administration." See Tai Yong, *The Garrison State*, p. 17.

of the Punjab, to describe the province as a "beneficiary" of colonial rule would, however, be inaccurate.[8] This revisionist perspective persuasively posits that despite major economic change and significant growth in agricultural production, this "new agrarian frontier" actually remained an underdeveloped region. At the same time, the special imperatives of colonial rule in the Punjab introduced and entrenched large-scale social and structural changes in its political economy, which had various long-term adverse effects on Punjabi society. These effects continue to have contemporary reverberations.[9]

The most significant development introduced in British Punjab was the colonization of large tracts of semi-arid areas in Western Punjab (otherwise sparsely populated by semi-nomadic populations) through the construction of nine canal colonies which collectively constituted the largest canal irrigation scheme in the world. This project entailed massive rural emigration from Eastern Punjab in order to settle these areas.[10] Once the canal colonies were settled, the colonial state enjoyed special authority over the "hydraulic society" – not just over the land (which it designated as "Crown Waste Lands") and water, but also over the manner in which land was to be disposed of, to whom land was to be allotted, and the type of terminal rights that were to prevail. Land distribution based on state *fiat* was essentially: to reward loyalty and service to the Crown by strengthening the status and authority of loyalist classes of Punjabi society that assisted the colonial authorities in its governance of the Punjab;[11] to extract greater revenues from increasingly

[8] I. Ali, *The Punjab under Imperialism, 1885–1947* (Oxford University Press, 1993).

[9] Ali, *Punjab under Imperialism*. The classic account of the increasing dependence of the Punjabi farmer on debt under the various land alienation, proprietary ownership, and land market economy development related changes in colonial Punjab can be found in M. Darling, *The Punjab Peasant in Prosperity and Debt*, 2nd edn. (Oxford University Press, 1928). To appreciate the reasons behind the eventual ascendance of customary law in Punjab and the colonial imperatives driving the same, see D. Gilmartin, "Customary Law and Shariat in British Punjab" in K. P. Ewing (ed.), *Shariat and Ambiguity in South Asian Islam* (Berkeley: University of California Press, 1988).

[10] See Ali, *Punjab under Imperialism*.

[11] Ali, *Punjab under Imperialism*. Recent histories posit that although the officially stated colonial policy aims for colonization of land in the Punjab were to provide relief from population congestion in the east, to settle land with more efficient agriculturists, and to improve rural living standards, the real motives lay well beyond this. Some of the specific examples of the use of colony land for rewarding loyalty were the "Loyalty Clauses" written into tenurial settlements; the frequent punitive confiscation of land grants for curbing crime, for reclamation of criminal or wandering tribes, and for tackling disloyalty (especially to fight anti-colonial state agitations and pro-independence movements); the

productive agriculture and the newly emerging economy of land;[12] and for various military schemes in order to boost, reward, and incentivize the military.[13] Therefore, not only did this interventionist imperialism cause major physical and social displacement through the large-scale East to West migration, it also oversaw a massive social engineering of the Punjabi society, creating, boosting, and entrenching various stratifications and hierarchies in terms of caste and class. A prime example was the British classification of Punjabis into the clearly preferred "agriculturist" and neglected "non-agriculturist" castes, which also determined eligibility for land grants or deprivation from the same and reduction to a dependent status. This naturally resulted in a virtual monopolization of colony lands by castes ranked higher in economic position and social status, as recognized or defined by the colonists. Those who lost out were the landless peasants, menial castes, and locally displaced semi-nomadic and indigenous people.[14]

This historical perspective demonstrates that the colonial land distribution in the Punjab, governed as it was by the imperatives of political consolidation, military needs, and the maintenance of an extractive revenue/tax system in order to finance overall administration, failed to provide concerted developmental stimulus, agricultural modernization,

grant of large rewards of land to the politically loyal and those who performed services for the Raj; the reformatory settlements for convicts; and the grants to religious shrines and missions that were political supporters of the Raj and provided useful mechanisms of social control through religion (ibid.). Also, see generally Tai Yong, *The Garrison State*, for a fascinating discussion of how key colonial decision-making in the Punjab was driven by the need to use and maintain the province as a recruiting ground for the army, and the various consequences and outcomes of that policy which in turn led to the formation of a distinctive civil–military regime during the first half of the twentieth century.

[12] See generally Ali, *Punjab under Imperialism*.

[13] Ali, *Punjab under Imperialism*. Under colonial Punjab, the military figured very prominently as a recipient of land – one direct ramification was that much of the land went to less productive use. Since the so-called "Martial Races" were a seminal source of British authority in India, vast tracts of Punjabi land were used to raise cavalry, establish horse and camel breeding schemes, and set up settlements for ex-soldiers of the British Army, in order to make military service more attractive. Such land grant policies not only impacted on land productivity, as many military men were not very good farmers, they also had deep and longer-term ramifications in terms of, inter alia, the creation of absentee landlords, growing strength of the military in the Punjabi society and its contribution to various anti-modernism trends, escalating resentment against military landlords in other sections of society, and loss of revenue to the government due to lenient revenue and other privileged terms granted to military landlords (ibid.).

[14] Ali, *Punjab under Imperialism*.

social development, and more equitable distributive arrangements. Therefore, while the canal colonies produced vast opportunities and catalyzed significant economic growth, the Punjab still remained an underdeveloped region – with a pyramidal structure of extraction. Income coming from the effort of laborers, subtenants, servitors, and self-cultivating peasant grantees was absorbed by an officially supported and loyal rentier class of absentee landlords and other privileged classes who were entrusted with proprietorial, supervisory, and distributive functions. The various inequitable extractive and rent-seeking aspects of this new Punjabi agrarian society aided in transferring tremendous amounts of wealth to the colonial state, the dominant classes, and a whole range of profiting intermediaries.[15] The same dominant rural landlord groups, with a strong nexus with the military, formed the Punjab Unionist Party that controlled Punjabi politics right up until independence in 1947, thus precluding any widely based, grassroots politics and the formation of alternative political organizations in this part of India. The Unionist brand of politics remained staunchly opposed to and resisted progressive land reform, the growth of legislative politics, political development, social reform, and wider representation of Punjabis in government and politics. Instead, prominent roles in the corridors of power remained reserved for the landlords, military, and bureaucracy – the ruling triad of the Punjab that has regularly chosen to ally itself with the forces of authoritarianism in Pakistan, rather than with the heralds of democratic rule.[16] It is against this backdrop of the historical evolution of the Punjab's political economy and its current patterns of political and economic power that the Crime Survey sought to gauge the experience of Punjabis with its criminal justice system.

[15] Ali, *Punjab under Imperialism*. The social class structure of colonial Punjab was based on: the "landholding peasantry" chosen from the "agriculturist castes" (regarded as the backbone of Punjabi society, and the main provider of political support and military recruits); the elite absentee and rentier "land lords" (the main political assets for colonialism and custodians of a rigidified social and class structure); the bourgeoisie traders, contractors, or other entrepreneurs (who were awarded land grants mostly as retired civil servants, and who also benefited from increased employment opportunities that emerged through economic expansion); and the rural poor. These traditional roles were generally preserved and augmented. The rural poor remained dispossessed, and also had no political rights under British rule, such as the right to vote (ibid.).

[16] Ali, *Punjab under Imperialism*. See also Tai Yong, *The Garrison State*, pp. 307–9.

Characteristics of the sample population

The Crime Survey endeavored to capture the diversity across the Punjab along multiple household and individual characteristics. Therefore, the sample population displays considerable variation in terms of geographical location, extent of urbanization, household wealth, religion, caste, gender, age, education, occupation, and "occupational privilege in terms of access." Table 3.2 above shows the breakdown in terms of geographical location. As to location on the rural–urban spectrum, 63 percent of the surveyed households were situated in the rural areas, another 20 percent were in urban settings (small towns and semi-urban areas for which the term "other urban" is used in this analysis), and the remaining 17 percent were located in a major city. Potohar Town is a completely rural tehsil, while Samanabad Town in Lahore (hereinafter referred to as "Lahore") is a completely urban one. Wazirabad and Kehror Pacca tehsils, on the other hand, have both rural and urban populations.

In terms of education, 26 percent of the respondent population was completely uneducated. Those ranging from the uneducated to those with up to 10 years of schooling (Matriculation) totalled 84 percent. The sample population also captured disparity in education levels across different tehsils. Whereas 53 percent of the respondents from Lahore were college educated (with an FA/FSc degree or above), only 5 percent of the respondents from Kehror Pacca were college educated (even with a sample population almost twice as large as Lahore) – putting into sharp perspective the less significant socio-economic status of Kehror Pacca Tehsil as compared to Lahore, and the consequent adverse impact on access to higher educational opportunities.[17] Access to education emerged primarily as the privilege of the major city respondents, whereas the predominant majority of the survey population in Potohar Town, Wazirabad, and Kehror Pacca tehsils was educationally underprivileged.

In terms of monthly household income and relative wealth on an increasing scale, 10.5 percent of the respondents fell in the poorest household Category 1; 16 percent fell in the next more affluent Category 2; 19.5 percent fell in Category 3; 23 percent fell in Category 4; and, finally, around 31 percent fell in Category 5 or the most affluent category. The predominant majority of respondents in the least affluent categories, i.e. Categories 1 and 2, were from rural areas. Put another way, rural

[17] FA (Fellowship of Arts) and FSc (Fellowship of Science) are the primary 2-year college degrees that follow 10 years of schooling and are precursors to any higher education.

respondents comprised 94.5 and 85.5 percent respectively, of all the respondents from these low income categories – only two respondents from these categories belonged to the major city. At the same time, most of the respondents from the most affluent category (Category 5) belonged to the major city (51 percent). The bulk of the survey population, however, fell in Categories 4 and 5 – 23 and 31 percent respectively. As expected, most of the respondents in Categories 1 and 2 were from Kehror Pacca. The least number of respondents from these categories, on the other hand, were from Lahore.

An overwhelming majority of the Crime Survey households reported Islam as their religion (almost 99 percent); while just over 1 percent were Christian. On the other hand, caste emerged as a significant parameter given its historical role in ordering of Punjabi society. Overall, 67 percent of the respondents were from the "privileged castes" and 33 percent from the "less privileged castes." In terms of gender, 82 percent of the survey population was male and 18 percent was female. There were proportionately fewer female respondents from rural areas (14.5 percent of all respondents from rural areas), as compared to the urban areas (18 percent of all urban respondents) and major city (29 percent of all major city respondents). In terms of age, a large proportion of the respondents fell within the age categories of 25 to 40 years old and 40 to 50 years old, although the remaining two age categories of 18 to 25 and above 50 years old also had fair representation.

The Crime Survey population also displayed diverse occupational backgrounds.[18] These were divided into three categories in order to signpost those occupations that generally ensured higher social status, social confidence and mobility, networking possibilities, and, therefore, greater access to the government and other institutions, as compared to other occupations that generally provided lower levels of social leverage and access.[19] Respondents falling into the "High Access" category totalled 17.5 percent, 44.5 percent were in the "Medium Access" category,

[18] These included, inter alia, household servants, daily wage earners, shopkeepers, hawkers, personal business owners, public servants, people in private service, retired private and government officials, professionals, housewives, farmers, students, small traders, and the unemployed.

[19] Higher access was seen as a function of higher levels of education, personal capital and wealth, and/or social mobility and relationship-building possibilities. The "High Access" category included respondents who owned personal businesses or were public servants or professionals. The "Medium Access" category included shop keepers, those providing private services, retired individuals, farmers, students, and small traders. Finally, the "Low

and the remaining 38 percent were in the "Low Access" category. Proportionately speaking, most respondents from the rural areas fell in the "Medium Access" and "Low Access" categories – only 15 percent fell in the "High Access" category. Compared to this, 21 and 24.5 percent of the urban and the major city respondents respectively fell in the "High Access" category. A stark but unsurprising finding was that the predominant majority of the female respondents fell in the "Low Access" category (95 percent). This is almost exclusively because their reported occupation of "housewife" was deemed to be in the "Low Access" category – over 93 percent of the female respondents claimed to be housewives. In terms of caste, almost 46 percent of the respondents from the "less privileged castes" fell in the "Low Access" occupational category, as compared to 33.5 percent of the respondents from the "privileged castes." There was also direct and logical correlation between occupational privilege and education.

Crime, fear, and insecurity

Perception of the prevalence of crime

Citizen perception of a fairly high prevalence of crime in the Punjab is one of the significant findings of the Crime Survey. Collectively, as many as 58 percent of the overall respondents found the prevalence of crime in their area to be "alarmingly high" (4.5 percent) or "high" (53.5 percent), while only around 7.5 percent found it to be low. While this perception was high across the rural–urban spectrum, it was considerably higher in the "other urban" areas.[20] Furthermore, although high across the different geographical areas, demographic zones, and socio-economic regions covered by the four tehsils, the perception of high prevalence of crime was considerably pronounced in the socio-economically backward areas of the Punjab, specifically in the Kehror Pacca tehsil.[21] As to other

Access" category included household servants, daily wage earners, hawkers, housewives, and the unemployed.

[20] 76.5 percent of the respondents in the "other urban" areas reported "alarmingly high" or "high" levels of crime, as compared to 61 percent of the "major city" respondents and 52 percent of the rural area respondents.

[21] In Kehror Pacca, 77.5 percent of the respondents reported "alarmingly high" and "high" prevalence of crime. The sample households from Kehror Pacca fell in both rural and "other urban" areas. The tehsil's poor socio-economic performance, together with its location in Southern Punjab (widely regarded as the least developed area in Punjab), seems to have a direct linkage with popular perceptions of high levels of crime.

significant variables, the younger respondents displayed greater anxiety and reported higher perceptions of prevalence of crime in proportion to the overall size of this respondent category.[22] Finally, the poorer households showed a higher perception of the prevalence of crime as compared to the more affluent households.[23] The perception of crime also showed some variations when it came to other individual or household characteristics such as gender, caste, education, and occupational privilege.[24]

Perception of crime growth rate

In addition to gauging generic perceptions of crime, the Crime Survey also attempted to evaluate whether respondent views were simply based on general and relatively unspecific notions of prevalence of crime or whether they were actually able to discern and nuance tangible changes in crime rate over time. The survey results showed very high perceptions of a very significant or fairly substantial growth in the crime rate or perceptions of no improvement in the previous high prevalence of crime in their areas. An aggregate of 92 percent of the respondents either reported increasing rates of crime (69.5 percent) or no improvement in the high prevalence of crime from before (22.5 percent). (While looking at the latter responses it needs to borne in mind that 58 percent of all respondents had reported existing levels of crime to be "alarmingly high" or "high" in response to the previously discussed query.) In other words, a very small section of the survey population (around 7 percent) reported a decline in the crime rate. Furthermore, the perception of growth in

As compared to this, 61, 58, and 29.5 percent of the respondents from Lahore, Wazirabad, and Potohar Town respectively reported "alarmingly high" or "high" prevalence of crime in their areas.

[22] 71, 58, 58, and 48 percent of respondents aged 18–25, 25–40, 40–50, and 50+ respectively reported "alarmingly high" and "high" prevalence of crime.

[23] 69.5 percent of the households in Categories 1 and 2 and 55 percent of all the respondents in the more affluent Categories 4 and 5 said that the prevalence of crime was "alarmingly high" or "high."

[24] In terms of gender, 60 and 53 percent of the male and female respondents respectively; in terms of caste, 57 and 59 percent of the respondents from the "less privileged" and "privileged" castes respectively (although it has to be borne in mind that the total number of respondents belonging to the "less privileged" castes is less than half of those belonging to the "privileged" castes); in terms of age, 58 percent of the uneducated respondents, as compared to 65 percent of those with a FA degree or higher educational qualification; and in terms of occupational privilege, 61.5, 55.5, and 55.5 percent of the "Medium Access," "Low Access," "High Access" respondents respectively reported "alarmingly high" or "high" perceptions of prevalence of crime.

crime rate or perpetuation of earlier high rates of crime was more or less uniformly escalated across the rural–urban spectrum.[25] In addition, although the perception of significantly or substantially increasing rates of crime or unchanging high prevalence of existing crime rate was very high across the different geographical areas covered by the four tehsils, it was remarkably high in the socio-economically backward areas of the Punjab (particularly in the Potohar Town (98.5 percent) and Kehror Pacca (96.5 percent) tehsils – these tehsils also had the highest proportion of rural population among all four tehsils).[26] In terms of other variables, a somewhat higher percentage of respondents belonging to the "less privileged" castes reported perceptions of a growth in crime rate.[27] Additionally, the younger respondents once again displayed greater anxiety and reported proportionately higher perceptions of growth in the crime rate.[28] The same was the case with poorer households.[29] The perception of growth in crime rate also showed some variations when it came to other individual or household characteristics, such as education and occupational privilege.[30] The overall indicators do not bode well for the effectiveness of recent legal and institutional measures undertaken to improve the state's ability to prevent and fight crime in the Punjab.

[25] 94.5 percent of the respondents in "other urban" areas, 87.5 percent of the "major city" respondents, and 91.5 percent of the respondents from the "rural areas" reported this.

[26] The rest of the numbers are as follows: Lahore – 88 percent and Wazirabad – 84 percent.

[27] 93 percent of these respondents reported actually increasing rates of crime or persisting current high prevalence of crime (with 74 percent reporting increasing rates of crime), as compared to 91 percent of the respondents belonging to "privileged" castes (with 67 percent reporting increasing rates of crime). As compared to the 5 percent of the "less privileged" caste respondents who reported a drop in the crime rate, 7.5 percent of the respondents from the "privileged" castes reported a drop.

[28] 77 percent of those between 18 and 25 years of age reported this, as compared to 63, 72, and 69 percent of those aged 25–40, 40–50, and 50+ respectively.

[29] 83 percent of the respondent households in Categories 1 and 2 reported a significant or substantial growth in the crime rate in their areas, as compared to 63.5 percent of all the respondents in the more affluent Categories 4 and 5.

[30] The percentages of those who reported a significant or substantial increase in the rate of crime in terms of these variables are as follows: 74.5 percent of the uneducated respondents, as compared to 68.5 percent of those possessing a college education (FA/FSc or above); and 69 percent of the respondents from all the other occupational privilege categories, as compared to 74 percent of the "Middle Access" category. One explanation for this can be that unlike the "High Access" category respondents, these respondents were not that influential or well connected, and unlike the "Low Access" category respondents who also included many housewives without much direct social interaction outside their households, they engaged with the world outside the household.

Most common crimes in the area

In order to develop a better understanding of the most prevalent crimes in the Punjab, the respondents were asked to report the top three crimes in their areas. Theft, robbery, drug consumption, animal theft, and domestic violence were the top five reported crimes respectively – with purse snatching/mobile phone theft and vehicle theft following as a close sixth and seventh. There was variation in the responses along the rural–urban spectrum. For instance, animal theft and roadside robbery emerged as more prominent rural area crimes, while purse snatching/mobile phone theft and female harassment emerged almost exclusively as major city crimes. However, theft, robbery, drug consumption, and vehicle theft appeared as major problems across the board. There were also some noteworthy tehsil-wise variations.[31]

Crimes with the most adverse impact on citizens

The Crime Survey also sought the respondents' feedback on the top three crimes in their areas which in their view had the most disruptive and socially damaging effect on their lives, either in terms of seriousness of impact or regularity of occurrence. Apart from the crimes reported in response to earlier questions, the respondents highlighted fraud, overcharging, and murder. An important insight was the vulnerability of different sections of society to different crimes based on their education and economic status.[32] This highlighted the fact that while governmental intervention in fighting crime may directly benefit certain sections of society, the intervention, given limited resources, is invariably selective and may neglect certain sections of society that are more vulnerable to crimes which are low on the official crime-fighting priority list.

[31] For instance, domestic violence was widely reported by respondents from Wazirabad and Potohar Town; whereas purse snatching/mobile phone theft and female harassment figured prominently in major city responses. Animal theft also seemed to be a major issue in Wazirabad and Potohar Town.

[32] For instance, purse snatching/mobile phone theft is a crime about which the uneducated had less reason to be concerned compared to those with a college education, but not surprisingly the situation was the reverse when it came to animal theft. Furthermore, in terms of the respondents' monthly household income, it emerged that although the sensitivity levels to the most frequently mentioned crimes were fairly symmetric across the board, there were variations in cases of crimes such as animal theft, purse snatching/mobile phone theft, and vehicle theft. The first concerned the less affluent households, while the latter two impacted the more affluent households.

General perceptions of safety

The sense of personal safety is a function of multiple social, economic, and institutional factors. Respondents were probed about these factors in order to find out whether, quite apart from holding views/perceptions about the general prevalence as well as the growth rate of crime, they by and large felt safe or unsafe. Further, they were asked about their comprehension of the societal and institutional reasons that contributed to their sense of safety or insecurity. Overall, 38.5 percent of the respondents across the board reported feeling "somewhat unsafe" or "very unsafe." However, tehsil-wise variations did emerge. The respondents from Kehror Pacca and Wazirabad displayed a greater sense of insecurity.[33] This is a highly intriguing result, as these tehsils are on opposite ends of the spectrum in terms of their socio-economic performance. Social and economic underdevelopment and lower resource allocation by the state to maintenance of law and order may explain the results from Kehror Pacca; greater affluence, higher incentives and opportunities for crime, and ineffective crime control, on the other hand, may be responsible for the results from Wazirabad. The results also showed that respondents from the "other urban" areas reported a greater sense of insecurity as compared to respondents from the rural and major city areas. The heightened insecurity in the "other urban" sections of population underlines the phenomena of haphazard and fast-growing rural migration to urban areas, the rapid expansion in the size of small towns and urban suburbs, the resulting changes in social and economic conditions, the swelling of the urban poor and homeless, the widening gaps between citizen needs and urban development, and, consequently, growing crime in the face of inadequate capacity and quality of policing in such areas.[34] Gender, caste, education, occupational privilege, and household wealth also seemed to have some, though comparatively less, bearing on the levels of respondent insecurity.

[33] The tehsil-wise responses in terms of reported sense of insecurity were as follows: Kehror Pacca – 54 percent; Wazirabad – 47 percent; Potohar Town – 21 percent; and Lahore – 20 percent.

[34] 59 percent of the respondents from the "other urban" areas reported feeling "somewhat unsafe" or "very unsafe," as compared to 37 and 20 percent of the rural area and major city respondents respectively.

Fear of walking alone and being home alone at night, and impact on quality of life

While gauging public perceptions of personal safety, the Crime Survey also posed more specific questions. For instance, the respondents were queried about how safe they felt while "walking alone at night." Confronted with a real everyday experience, the respondents displayed even higher levels of apprehension and a sense of insecurity, as compared to when they were asked a broad question about their general sense of safety – an overwhelming 87 percent of the respondents shared that they felt "somewhat unsafe" (74.5 percent) or even "very unsafe" (12.5 percent). The apprehension was particularly high among the respondents from Kehror Pacca (95 percent) and Potohar Town (91 percent).[35] The apprehension levels were high across the board on the rural–urban spectrum, but once again particularly high in the "other urban" areas (97.5 percent) of the sample population.[36] The less educated and less affluent respondents expressed a greater level of insecurity.[37] The levels of apprehension were more or less uniformly high across other personal variables.

The respondents also reported fairly high levels of insecurity when they were "alone at home at night." Although the home is normally regarded as a safe haven for its occupant, as many as 45 percent of the total respondents reported feeling "somewhat unsafe" (40 percent) or "very unsafe" (5 percent) while being "alone at home at night." Although the Crime Survey revealed considerable levels of anxiety across the rural–urban spectrum, the major city respondents displayed proportionately higher levels of anxiety (54 percent) – highlighting their concerns about vulnerability to certain kinds of crimes, such as burglaries and break-ins.[38] The more educated and less affluent respondents expressed a

[35] This is as compared to 84 percent from Wazirabad and 72.5 percent from Lahore.

[36] This is as compared to 88 percent from the rural areas and 72.5 percent from the major city.

[37] 91 percent of the uneducated respondents reported varying levels of apprehension, as compared to 82.5 percent of those who had a college degree (FA/FSc or upwards). Also, 92 percent of all respondents in Categories 1 and 2 reported varying levels of apprehension, as compared to 84.5 percent of all respondents in the more affluent Categories 4 and 5. However, the general perception of lack of safety while "walking alone at night" was generally very high across the wealth spectrum: for instance, it was also around 91 percent for Category 3.

[38] This is as compared to 44.5 and 40.5 percent of the village dwellers and those living in "other urban" areas respectively. The tehsil-wise break-up is as follows: Lahore – 54 percent; Kehror Pacca – 50 percent; Wazirabad – 48.5 percent; and Potohar Town – 28 percent.

greater sense of insecurity at being "alone at home at night."[39] There were also some variations due to gender, caste, age, and occupational privilege.

Finally, the respondents were asked about the extent to which the apprehension of becoming a crime victim adversely affected the quality of life of their households. As many as 94.5 percent of the overall respondents reported: "some adverse impact" (70.5 percent) or a "substantial adverse impact" (24 percent) on their households' quality of life. An overwhelming majority of the respondents across the rural–urban spectrum and the four surveyed tehsils reported different levels of adverse impact on their households' quality of life.[40]

Factors contributing to safety

Given these alarming levels of reported insecurity and apprehension, the respondents were then asked to list three factors which, in their view, actually contributed the most to safeguarding their person and property. The results are quite telling. The Crime Survey respondents attached significantly less importance to the "security provided by police/state," as compared to a host of other possible personal, social, and institutional factors when it came to safeguarding their person and property. Respondents across the Punjab placed much more faith in "personal influence" (998), "influential relatives" (954), "not falling foul of criminals or local powerful people" (892), and "having male children" (801). The "security provided by police/state" was only the seventh most frequent response (612). As a percentage of the aggregate overall responses, only 9.5 percent of the respondents pointed out the role of the police and the state as contributory to their sense of security. Such lack of confidence in the state's law enforcement capacity and effectiveness was consistent across the rural–urban spectrum, as well as the four tehsils.

[39] 46 percent of the uneducated respondents reported varying levels of apprehension, as compared to 49.5 percent of those who held a college degree of FA/FSc or above. 52.5 percent of the respondents in Categories 1 and 2 reported varying levels of apprehension, as compared to 45.5 percent of all respondents in the more affluent Categories 4 and 5.

[40] Along the rural–urban spectrum, 93 percent of the respondents from rural areas, over 99 percent of the "other urban" respondents, and 96.5 percent of the major city respondents reported adverse impact, either substantial or partial. The story was fairly similar across the four tehsils, with the percentage of respondents reporting varying levels of adverse impact on quality of life as follows: 97 percent of the respondents in Kehror Pacca (the least developed tehsil); 98.5 percent in Potohar Town (the exclusively rural tehsil); 97 percent in Lahore; and 88 percent in Wazirabad.

However, it was more pronounced in the rural and "other urban" areas – quite disturbingly, in the latter, "not falling foul of criminals or local powerful people" was the foremost strategy of choice. Alarmingly, it was also the second most popular response from the major city respondents. Although there was comparatively greater confidence reposed by the major city respondents in the state's law enforcement capacity, even there "the security provided by the police/state" was not one of the top three responses.[41] What is noteworthy is the near absence of responses from the least socio-economically developed tehsil of Kehror Pacca that attribute any significance to the security provided by the police/state (a mere 0.1 percent).[42]

Reasons for crime, community organization, and popular reform recommendations

Asked about the main reasons behind incidence of crime, the respondents highlighted "unemployment," "negligence of police," and "poverty" as the three most important contributory causes, in that order of significance. They were also queried about the role of the neighborhood/community in preventing crime, the actual levels of public participation

[41] The three most common responses from rural respondents were: (1) "influential relatives"; (2) "personal influence"; and (3) "having male children." The top three responses from "other urban" respondents were: (1) "not falling foul of criminals or local powerful people"; (2) "influential relatives"; and (3) "personal influence." Finally, the three leading responses from major city respondents were: (1) "personal influence"; (2) "not falling foul of criminals or local powerful people"; and (3) "having male children." "The security provided by the police/state" was the fourth most popular response among major city respondents and hence it was only in the major city that the positive role and protective responsibility of the police/state adduced any public confidence. In "other urban" and rural areas, it lagged considerably behind other factors.

[42] In Kehror Pacca, "not falling foul of criminals and local powerful people" was the main reported strategy for staying safe, followed by "having influential relatives" and "personal influence." Only 0.1 percent of respondents cited the role of the police/state. In the exclusively rural Potohar Town, however, local police measures seemed to have somewhat boosted the public confidence, as safety provided by the police/state emerged as the top factor, followed by "relationship with local politicians" and "having male children." In the most socio-economically flourishing of the four tehsils, i.e. Wazirabad, "personal influence," "influential relatives," and "personal wealth" emerged as the top reasons. Only 10 percent of the responses cited the safety provided by the police/state. Finally, in the major urban locality of Lahore, "personal influence," "not falling foul of criminals and local powerful people," and "having male children" were the top three factors governing personal safety and security of property. The safety provided by the police/state was the fourth most popular response (12.5 percent of overall responses).

in community policing, and, in case of non-participation, the reasons for the same. A majority of the respondents, especially those belonging to the major city, were of the view that the neighborhood/community could play a very positive role in crime prevention. However, although apparently enthused by the idea, relatively very few respondents, especially from the rural areas, reported having actually played any role in the past in neighborhood/community efforts to fight crime. "Paucity of time" was the main justification offered for non-involvement. However, it is significant to note that if one aggregates several other types of responses, a strong critique of the state emerges. These comments identify "institutional inertia," "lack of governmental initiative," or "failure of public/private cooperation" as the causes for community policing not taking root – thus, attributing citizen non-involvement in community policing directly to lack of governmental support for such initiatives.

An important additional insight provided by the responses is that despite the above-mentioned acute lack of public faith in the capacity of the police to safeguard life and property, a vast majority of the respondents across the rural–urban spectrum and the four tehsils firmly held the police as primarily responsible for crime control in their areas. In other words, while they currently repose their faith in various personal and societal factors and mechanisms for ensuring their security, they continue to unequivocally assign the responsibility for such protection to the state and the police. At the same time, they strongly emphasized the need for greater "police accountability" and highlighted it as the most urgently needed measure for ensuring effective crime prevention. The next most prominent reform suggestion pertained to the "reorganization of the police system." The poorer respondents were relatively more strident in their calls for police accountability, even though the sentiment ran high across the board.[43]

Victim analysis

Actual victims of crime

Moving on from the more general perceptions and perspectives, the Crime Survey then focused on the direct personal experiences of those respondents who were actual victims of crime, or whose family members,

[43] 55 percent of the respondents in Categories 1 and 2, as compared to 51 percent of all the respondents in the more affluent Categories 4 and 5, emphasized the need for greater accountability of the police.

close friends, relatives, or neighbors had been victims of crime. This was to more closely appreciate the extent and nature of crime in the Punjab, as well as to better understand the dynamics of the direct interaction of victims of crime with state institutions responsible for reporting, registering, and investigating crime. The vast majority of the survey population (82.5 percent) reported personally being victims of crime or family members, close friends, relatives, or neighbors being victims of crime. Direct or indirect crime victims came forward in great numbers across the rural–urban spectrum and the four sample tehsils, with some variations.[44] As many as 38 percent of these overall respondents were personally the victims of crime; 10 percent reported members of their households as victims; and the remaining 52 percent were "indirect victims" as they identified people closely known to them – friends, relatives, or neighbors – as victims of crime. Comparatively more "direct" victims of crime (the victims being themselves or family members) were from the villages,[45] particularly from the least socio-economically developed Kehror Pacca tehsil.[46] Some interesting variations appeared across other personal and household variables. Also, there were some striking results that revealed greater levels of vulnerability to crime, as well as more robust social/community safeguards against crime, in different areas.[47] Very importantly, almost all the respondents reported various types and levels of post-crime stress,

[44] In terms of the rural–urban spectrum, 82 percent of the rural respondents, 89 percent of the "other urban" respondents, and 81 percent of the major city respondents responded in the affirmative to this question. In terms of tehsil-wise analysis of responses, Kehror Pacca once again emerged as the leader, with almost 90 percent of its respondents reporting being directly or indirectly the victims of crime, with Lahore not too far behind with over 80.5 percent respondents reporting the same, followed by Wazirabad and Potohar Town (both at 79 percent).

[45] 50 percent of all the rural respondents identified themselves or members of their families as victims of crime, as compared to 44.5 percent of the respondents from the "other urban" areas and 49 percent of the major city respondents.

[46] In terms of tehsil-wise categorization, the percentage of responses is as follows: Kehror Pacca – 63 percent; Lahore – 49 percent; Potohar Town – 42 percent; and Wazirabad – 34 percent.

[47] For instance, in terms of age, the bulk of the crime victims fell in the 24–40 and 40–50 age categories. One of the results which stood out, however, was the proportionately higher rate of crime against people over the age of 50 in Wazirabad tehsil (11 percent of all the victims in Wazirabad). The other striking result was that proportionately many more young respondents (below the age of 25) were the victims of crime in Lahore (39.5 percent of all the victims in this tehsil). As to the findings regarding the age of victims along the rural–urban spectrum (excluding respondents reporting themselves as victims), there was proportionately higher reported crime against the

general distress, fear, family suffering, public humiliation, loss of faith, and/or a sense of personal insult.

Nature of crime and reasons for victimization

The direct and indirect victims of crime were also asked about the nature of these crimes and the frequency of victimization. Theft, roadside mugging, and robbery were the most frequently reported crimes, followed by animal theft and motorcycle/bicycle theft. A very large proportion of the respondents also spoke about repeat victimization. In terms of the frequency of specific crimes across the rural–urban spectrum, robbery and theft were the most commonly reported crimes by respondents from the major city and "other urban" areas. On the other hand, roadside mugging, theft, and animal theft were the most commonly reported crimes by rural respondents.

The respondents were then probed for their thoughts on why they or those related or close to them had become crime victims. A significant number were of the view that they were targeted by organized crime networks (48 percent) or premeditated crime (20.5 percent), as compared to those who felt that they had fallen prey to spontaneous or opportunistic crimes (18 percent). Furthermore, many respondents reported that the types of crimes to which they had fallen prey were prevalent in their areas. Those who thought they were the victims of organized crime were spread more or less evenly across the rural–urban spectrum, although comparatively more respondents from the "other urban" areas were of this view (52 percent), as compared to the rural areas (47 percent) and the major city (43.5 percent). Respondents from the completely rural Potohar Town expressed the most concern about being victims of organized crime (53.5 percent), followed by Wazirabad (51 percent), Lahore (44 percent), and Kehror Pacca (43.5 percent).

older citizens in rural and "other urban" areas, as well as against citizens aged 18–25 years old in the major city. As a proportion of the overall number of victims in the area, female victims were more prominent in Lahore, followed by the "other urban" areas in Wazirabad and Kehror Pacca, as compared to rural areas such as Potohar Town. These variations and trends can be quite useful for diagnosing the nature and dynamics of crimes in different areas, as well as the variable levels of citizen vulnerabilities and safeguards which are a function of different personal, household, and geographical factors.

Identity of the criminal and effectiveness of police investigations

The respondents who reported being direct or indirect victims of crime were further asked whether the victims knew the identity of the criminals prior to the commission of the crimes. Over 17 percent of the respondents replied in the affirmative. However, the remaining 83 percent either did not know the criminals or the respondents did not have this information. Those who had said that the criminals were unknown to the crime victims were then asked if they were ever identified: an overwhelming majority replied in the negative (92 percent). Furthermore, even among those very few who reported that the criminals had eventually been identified, more people attributed such discovery to their own efforts or those of their relatives/community – only an abysmal 2 percent said that successful police investigations had led to the identification of the criminals.[48] Acute respondent dissatisfaction with the ineffectiveness of police investigations in identifying criminals was uniformly high across the rural–urban spectrum and the different teshils.[49]

Crime reporting

Experience of reporting crime to police

Given the respondent feedback on the ineffectiveness of police investigations, lack of governmental support for community attempts to fight crime, and reportedly rampant organized crime in various parts of the province, the Crime Survey further explored other important facets of citizen interaction with the police. Crime victims, as well as respondents who had said that a member of their households or someone known closely to them was a crime victim, were asked about their experience of reporting crime to the police. The results brought forth fairly low levels of

[48] Just over 3 percent of these respondents said that the efforts on part of their relatives/community had led to the successful identification of the criminals; an additional just over 2.5 percent said that their personal efforts had led to identification.

[49] An overwhelming 94.5 percent of the respondents from the "major city" said that the criminals were never identified, while just over 3 percent said that police investigations had led to their identification. The comparable statistics were 92 and 1 percent respectively for respondents from the rural areas; 89 and 3 percent respectively for respondents from the "other urban" areas; over 96.5 and 0 percent respectively in the completely rural Potohar Town tehsil; over 95 and just over 2.5 percent respectively in Wazirabad; over 94.5 and just about 3 percent respectively in Lahore; and over 86 and only just over 1 percent respectively in Kehror Pacca.

reporting – only 33 percent of these respondents said that they had reported the crime to the police. Although crime reporting was very low across the rural–urban spectrum, it was especially patchy in the major city and rural areas.[50] When the non-reporters were asked whether they would be willing to report crime in the future, the less affluent, less educated, those belonging to the "less privileged" castes, those employed in "Low Access" jobs, and female respondents displayed less willingness to do so, as compared to their counterparts.[51] Thus, a clear correlation emerged between different kinds of social and personal vulnerabilities/disempowerments and lack of faith in the police. This was further confirmed by the fact that in response to a specific query, just over three-quarters (76 percent) of the respondents cited various critical reasons for not reporting crime in the past and/or unwillingness to do so in the future, which amply demonstrated their low levels of confidence in the integrity and efficiency of the police.[52]

[50] Only 27, 29.5, and a comparatively higher percentage of 49 percent of the respondents from the major city, rural areas, and "other urban" areas respectively said that they had reported the crime to the police. As to the tehsils, Lahore and Potohar Town displayed comparatively less reporting of crime in comparison to Wazirabad and Kehror Pacca.

[51] A clear correlation emerged between poverty and unwillingness or lack of assuredness about reporting a crime to the police. Over 55 percent of the respondents from Category 1 (the poorest households) said that they would not report a crime or were unsure if they would. However, compared to this, only 16 percent of Category 5 respondents (the most affluent households) gave this response. In other words, whereas over 84 percent of the most affluent respondents said they would file a crime report in the future, only 45 percent of the least affluent respondents said so. In terms of education, only 57 percent of the uneducated respondents displayed a propensity to report crime in the future, as compared to 85 percent of the respondents with a college degree. Further, 71 percent of the respondents from the "privileged" castes showed a propensity to file a crime report in the future, as compared to 62.5 percent from "less privileged" castes. 64.5 percent of the "Low Access" occupation respondents showed this propensity, as compared to 74.5 and 69 percent of "Medium Access" and "High Access" occupation respondents respectively. 72 percent of male respondents showed this propensity, as compared to 60 percent of female respondents.

[52] All those who had reported being crime victims or had not been victims in the past but still stated they would not file a crime report were asked for the reasons for their decision in the past and/or their lack of propensity to report crime in the future. The most common reason cited was "lack of faith that the police would provide assistance in case a crime is reported" (34.5 percent), followed by the reason that "filing a crime report would have involved too much inconvenience" (15 percent). Collectively, one can say that almost 50 percent of the respondents stayed/would in future stay away from reporting a crime to the police due to lack of confidence that it would be helpful, and also because they found the process too cumbersome. This number increases further if one includes the various other responses stating additional negative reasons such as: "dislike/fear of the police" (7.5 percent); "fear of intimidation by offender" (4 percent); "fear of getting falsely

Private solutions, coercion, forgiveness, and revenge

The Crime Survey also revealed a propensity on the part of certain respondents to not approach the police in case of a crime, but to resolve the matter on their own or through informal mechanisms – over 8 percent of the respondents who had reported that a member of their households or someone known closely to them was a crime victim were of this inclination. Although statistically not a high figure, the fact that some respondents preferred private solutions in the case of crimes – which could be of a grievous nature – was an important finding. When asked about their preferred mode of addressing the situation on their own, 53 percent of these respondents expressed a preference for reconciliation; 32 percent opted for forgiveness; and, quite alarmingly, the remaining 15 percent said that they had sought/would seek revenge – almost all of the responses in the last category emanating from the rural areas. There were interesting variations across the rural–urban spectrum and across the different tehsils on the question of private solutions. Importantly, there was also considerable diversity in terms of the popularity of different mechanisms for dispute resolution/reconciliation across various areas of the Punjab.[53] Those respondents who said that they had or would rather reconcile the matter on their own or had forgiven or would forgive the offender instead of filing a report with the police were also asked if such reconciliation/forgiveness was or would be likely to be consensual. A disturbing 38 percent of the respondents from across the rural–urban spectrum spoke of coercion and highlighted "pressure from local influential people," "pressure from the victim's family and *biradari*," and "pressure from the offender's family and

implicated by the police" (5.5 percent); "insufficient funds to offer to the police to file a report" (4.5 percent); "lack of influence" (2.5 percent); "police would ask for more money than the loss suffered" (1.5 percent); "police involvement would be useless" (0.5 percent); and "fear that the police itself is involved in the crime" (less than 1 percent).

[53] Many different modes of informal dispute resolution were reported across the Punjab with varying popularity in different areas, as well as diverse levels of public satisfaction with their output. The results pointed out *Panchayat* (29.5 percent), local influential people (28.5 percent), community (22 percent), and family (21 percent) as the main modes of consensual or forced reconciliation among the respondents who reported resorting to them rather than reporting crime to the police. In terms of a tehsil-wise analysis, "local influential people" seemed to play a very prominent role in Potohar Town when it came to such reconciliations, while "family" played a more prominent role in Lahore. Understandably, "*Panchayat*" was more visible in the rural areas, but was interestingly absent from Potohar Town, where "community," nevertheless, played an important role. *Panchayat* was most prominent in Kehror Pacca.

biradari" as the primary sources of coercive influence to settle or forgive. The same respondents were also asked about their degree of satisfaction with the outcome of such reconciliations. Around 32 percent said they were not satisfied. This is unsurprising considering that a segment of the same set had earlier reported coercion mandating such private solutions.

Crime registration with police

A sizable segment of the overall respondent population expressed serious reservations about the integrity and efficiency of the crime registration process. They highlighted problems of delay, corruption, vulnerability to external pressures, lack of police efficiency, commitment, and cooperation, and the consequent uncertainty and cumbersomeness of the crime registration process. On the whole, less education, less occupational access, and poverty had direct correlations with low levels of faith in the crime registration process.

Registering crime reports with the police

To further deconstruct and understand the phenomenon of citizen interaction with the police, the respondents who had earlier said that the crimes had been reported to the police – crimes of which they, members of their households, or people known closely to them were victims – were then asked whether the police had actually lodged a FIR (First Information Report) in view of the reports. Many respondents either replied in the negative (26.5 percent) or were unsure as to what actually transpired after the reports were made (22.5 percent) – a total of 51 percent. Proportionately more rural respondents reported lack of success in getting their crime reports registered or uncertainty about the follow-up on and outcome of their crime reports, with respondents from Potohar Town reporting the least degree of success (70.5 percent).[54]

A large section of the respondents also expressed low levels of confidence in the likelihood of the police registering their crime reports if they were to file such reports in the future. Once again, most of this skepticism emanated from the rural respondents, although such lack of confidence

[54] 54, 45.5, and 40 percent of rural, "other urban," and major city respondents respectively reported that their crime reports were either not registered or that they were unsure as to what actually happened.

was also prominent in the "other urban" and major city areas.[55] Based on their past experience, once again the less educated, less connected and less affluent respondents were proportionately more skeptical about the prospects of the police registering their crime reports in the future.[56]

Integrity and efficiency of the crime registration process

The respondents who had reported crimes and also confirmed the successful registration of FIRs as a result of their reports were asked whether the FIRs were actually lodged for the same crimes of which the reports were made, or for less serious crimes. Around 11.5 percent of these respondents stated that the FIRs were actually registered for less serious crimes. Importantly, over 36.5 percent of these respondents said that they were not sure as to the crimes that were eventually listed in the FIRs. This lack of certainty about the exact nature of the FIRs was most acute in the "other urban" area responses.[57] Tehsil-related information

[55] These were the respondents, or those whose kith and kin, who were not crime victims but who had earlier said that if they ever became victims they would file a crime report, or had expressed uncertainty over whether or not they would file a crime report in future. They were quite skeptical, however, about the eventual prospects of such future crime reporting. Over 67 percent of them said that they were unsure whether or not a FIR would be registered by the police; and another 19 percent said that they were quite sure that the police would not register a FIR even if they filed a report. Thus, only 14 percent of these respondents expressed the confidence that the police would actually register a FIR if they filed a report. Over 90.5 percent of rural respondents gave either of the two uncertain and hopeless answers; as did 89 and 76 percent of the "other urban" and major city respondents respectively. Consequently, 93 percent of the respondents from the exclusively rural Potohar Town and 97 percent of those from the primarily rural and the most backward tehsil of Kehror Pacca opted for either of the two negative responses.

[56] A mere 7 percent of the uneducated respondents as well as respondents with an education less than or equivalent to 5 years of schooling were sure that the police would register a FIR if they were to report a crime in the future, as compared to over 23 percent of respondents with a college degree. Over 87.5 percent of the "Low Access" and "Medium Access" occupation respondents were either unsure that the crime reported would be registered, or said that they were sure that the police would not register a FIR, as compared to around 79.5 percent of the "High Access" occupation respondents. In terms of the wealth of respondent households, only around 7 percent of the respondents from the less affluent Categories 1, 2, and 3 felt sure that the police would register a FIR, as compared to 16.5 percent of the respondents from the more affluent Categories 4 and 5. It is evident from these results that although comparatively high, the levels of confidence placed in the crime registration process by even the more educated, connected, and affluent respondents/households were quite low in absolute terms.

[57] 41 percent of the "other urban" area respondents said this, compared to 39 and 18.5 percent of the rural and major city respondents respectively.

revealed that with 49 percent of the respondents from Wazirabad confessing that they were unsure whether the FIRs were registered for the same crimes as the ones alleged in their crime reports, it was at the forefront of respondent uncertainty.[58] The respondents were also asked whether they had to pay a bribe in order to get the FIRs registered. A sizable chunk of over 33 percent of this set of respondents admitted to paying bribes. This percentage goes up to over 42 percent when one examines responses from the rural areas.[59] In the least socio-economically developed tehsil of Kehror Pacca, 41 percent of the respondents admitted to paying bribes.[60] Furthermore, the respondents were asked about the number of times they had to visit the police stations in order to get the FIRs registered. Responses from the rural areas show that it took an average of five trips to achieve results. Consequently, Potohar Town (with an average of 6.5 trips) and Kehror Pacca (with an average of five trips) – one an exclusively and the other a predominantly rural tehsil – emerged as the places where it took the longest, and hence the most amount of effort, to get a FIR registered.

Respondents whose crime reports had successfully culminated in the registration of FIRs were also asked to point out the single most helpful factor that had led to successful registration. "Using the help of local influential people" (40 percent of the respondents), "using political influence" (21 percent of the respondents), "using personal links with the police" (13 percent of the respondents), and "offering a bribe" (12 percent of the respondents) were the most frequent responses across the rural–urban spectrum. Positive institutional factors such as "responsible police," "impact of the Public Safety Commissions," "assertion of legal rights," "directives by a governmental institution," "order by a senior police officer," and "court orders," etc. adduced very few responses – collectively they added up to merely 14 percent of the overall responses. Finally, the respondents whose crime reports had not resulted in the registration of FIRs were asked the two main reasons why they thought the FIRs had not been registered. All of the prominent reasons offered by them were directly or indirectly critical of the police. The most

[58] 38, 25, and 18.5 percent of the respondents from Kehror Pacca, Potohar Town, and Lahore respectively reported the same.

[59] 29 and 17 percent of "other urban" and major city respondents respectively also admitted to paying bribes.

[60] 40.5, 30, and 17 percent of respondents from Potohar Town, Wazirabad, and Lahore respectively also admitted to paying bribes.

commonly offered reasons were: "non-cooperation by the police" (27 percent); "lack of *sifarish*" (contacts) (19 percent); "insufficient funds to offer a bribe/bear expenses" (14.5 percent); "tendency of the local police to under-report crime in its area" (14 percent); "complexity of the FIR registration process" (9.5 percent); and "influence exerted by the offender/money offered by the offender" (10 percent). In terms of the rural–urban spectrum, "non-cooperation by the police" was the single most frequently offered reason by the rural respondents; and "lack of *sifarish*" (contacts) was the single most frequently offered reason by respondents from the "other urban" and major city areas.[61]

Vulnerabilities, crimes, and social context: conclusions

The Crime Survey results highlight the importance of perception – more specifically in this case a perception of vulnerability and insecurity. If there is a socio-political domain wherein perception is as important as reality, if not more, it is that of security provided by the state to its citizens. Perceived insecurity can be as damaging for the social fabric and psychological health of a people as actual insecurity. The Crime Survey results actually bring forth very high levels of both perceived as well as actual insecurity in very different areas of the Punjab. Respondents across the rural–urban spectrum and the geographic and socio-economic diversity of the province reported, inter alia, perceptions of very high prevalence of crime as well as escalated growth in crime, heightened levels of insecurity, and acutely eroded confidence in the effectiveness and integrity of state institutions in containing and fighting lawlessness and crime. At the same time, the Crime Survey results also unveil a very high incidence of citizen victimization by crime. Such negative perceptions and experiences as well as low confidence in state institutions can increasingly persuade people to resort to all sorts of personal, and at times illegal, modes and mechanisms for resolving disputes; potentially chaotic, abusive, and coercive models of popular justice; and, indeed, violence and personal vendettas.

The Crime Survey has at least one promising finding. It is that despite strident criticism of the law enforcement agencies, many respondents still

[61] Across the tehsils, "non-cooperation by the police" was the single most frequent explanation offered by respondents from the primarily rural Kehror Pacca and Potohar Town, while "lack of *sifarish*" (contacts) was the single most frequent explanation offered by respondents from Lahore and Wazirabad.

consider the police as primarily responsible for crime control – loss of faith in the state has not yet reached anarchic proportions. This is even while they clamor for greater police accountability and institutional restructuring. Implicit in these exhortations for urgent reform is a popular recognition and resulting critique of various archaic aspects of the Pakistani criminal laws and police system – largely stunted and facing arrested development since the colonial era in which they were first envisioned and formulated. More specifically, the current official regimes of crime reporting, crime registration, and police investigations come across as three significant areas of the criminal justice system that receive scathing respondent feedback. At the same time, it is highly disturbing to note wide reporting of the existence of organized crime mafias in particular geographical areas of the Punjab, as well as a general state of lawlessness in others that are even otherwise socio-economically backward.

The fact that such a strong public indictment comes in the face of several recent justice sector reform programs (to which I shall turn from Chapter 5 onwards), which contained sizable components on police reform, indicates that they were largely reforms on paper. To the extent that some of these reforms were actually implemented, hardly any of the survey respondents seemed to be cognizant of them. Thus, along with deep dissatisfaction with the paucity of meaningful and sustainable citizen-centric reform, the respondent feedback also highlights the huge gaps in popular comprehension of any official reforms that may have actually been introduced. This further underlines the importance of building public participation and confidence in and around any positive initiatives by the state – especially in the rural and "other urban" areas – as well as regular two-way communication interfaces and feedback loops in order to raise public awareness and accountability of state institutions. It is alarming that to date there is no reliable, comprehensive, and regularly updated public data in Pakistan on citizen crime perception and victimization. The sheer absence of anything percolating upwards from the public to the policy-makers, in a scientific and systematic manner, raises serious questions about the rigor, meaningfulness, and transparency of the reforms introduced in the past.

Another important implication of the Crime Survey results is that they show the incidence of and apprehensions about certain types of crimes in specific areas and demographic categories. Context, therefore, as is abundantly clear, matters to a significant extent. This surely underlines the necessity to modify regional and local crime prevention and control

strategies in the Punjab, as well as the overall criminal and police law reforms, according to changing social conditions, emerging challenges, and the different nature of crime taking place in different areas. A good example is the high perception/incidence of crime in the "other urban" areas of the Punjab, which is probably the outcome of massive and unplanned rural migration, unregulated urbanization, and inadequate planning and resource allocation. A blunderbuss reform strategy is highly likely to miss out on important nuances of what may be of greater concern in a particular region/area or to a citizen category, as well as overlook what may present greater opportunities for addressing the same.

Very importantly in the context of the overall thesis of this book and further bolstering the empirical findings discussed in the previous chapter, the Crime Survey results furnish significant additional evidence for the societal entrenchment of certain kinds of disempowerments – be they in terms of gender, religion, caste, age, education, occupational privilege, wealth, or geographical location. These disempowering characteristics, as the results show, regularly expose certain categories of citizens and specific sections of society to greater exploitation and rights violations. At the same time, the victims of crimes are also not one homogenous, malleable, and uniform mass of people – crime has a way of picking out the weaker and more susceptible. Given the afore-discussed specific ethos and structures of the colonial political economy of the Punjab, and the perpetuation of some of its more inequitable and disempowering frameworks in contemporary Punjab, state attention urgently needs to refocus on the living realities. It is unambiguously evident that the historically backward areas and the systematically depressed people of the province continue to remain caught up in the web of special vulnerabilities and hence greater exposure to crime and exploitation. This chapter has highlighted the persistence of economic and social backwardness in certain areas of the Punjab, the continuing colonial asymmetric land relationships as well as its social organizational patterns of special privilege and general neglect, and the limited access of vast sections of the Punjabi rural population to productive assets and economic and social mobility. The chapter puts forth evidence to show important linkages between these various phenomena and particular peoples' legal disempowerment, vulnerability to crime, and general sense of insecurity. These are hitherto neglected and very significant areas of future empirical inquiry. Reform that does not learn from and respond to such empirical appreciation, and that is not flexible, adaptive, and multi-pronged, is

highly likely to choose misleading priorities and wrong directions. The cost of such failure is very high, as is evidenced by the survey results. Vulnerability grows, exploitation escalates, and so does discontent, loss of faith, and collective despair – and worse still, mayhem, lawlessness, and violence.

Any crime control/criminal law reform strategy – as indeed the country's larger economic development and political empowerment strategy – that does not undertake steps to divert extra attention and resources to those who are more vulnerable risks not just ineffectiveness, but can also be increasingly perceived and labeled as elitist, inequitable, and discriminatory. This makes it integral to appreciate the political economy of crime and to approach reform not purely from a legal technocratic standpoint (which focuses on stronger policing, prevention, investigation, and conviction), but also a politico-economic development, social justice, and constitutional rights oriented perspective. In this context, it is significant that the survey responses highlight poverty and unemployment as the two main contributory reasons for escalating crime. A further important sociological insight provided by the Crime Survey is that as people lose faith in state institutions, they may be persuaded or forced to rely instead on local influential people and power brokers, family and *biradari*, as well as graft, bribes, personal connections, and influences. Even for those who persist with the formal legal system, the underlying motivation may not always be to legitimately safeguard life and property; for many, it may be to abuse the formal justice and police systems of the state for coercive and parochial ends. A weakened state in such a milieu is bad news in itself, but increasing abuse of the state systems and institutions can further seriously impair the development and growth of a fair and just society – a state of affairs that is bound to catalyze the spawning and nurturing of discord, violence, and crime. The Crime Survey results also give insights into the escalation of such coercive and parochial abuse, together with the increasing ineffectiveness of legal and institutional mechanisms for deterring the same.

At the same time, the formal legal and police systems, especially in contexts like Pakistan where the state constantly faces resource constraints and multiple pressing priorities, cannot choose to ignore the valuable opportunities for public/private partnerships, and community legal awareness and crime prevention programs. Equally, they cannot afford to marginalize and ignore cheaper and accessible local dispute-resolution mechanisms – specifically for disputes that do not involve serious crimes or actual or potential rights violations of the vulnerable –

which enjoy wider public trust and effectively follow the essentials of due process. Considered acceptance of and investment in such local mechanisms could help reduce the mounting burdens on policing and the courts, provide additional accessible alternatives to the public, and also reduce the growing alienation between a wary and distrustful public and a seemingly aloof and unapproachable state. Needless to say, any initiatives in this direction – which on current evidence are more or less non-existent – have to be undertaken while ensuring that any state intervention does not transform any such local/informal mechanisms for dispute resolution into a phenomenon that is as inaccessible, cumbersome, expensive, and vulnerable to elite capture as the formal mechanisms they are meant to partially substitute and supplement.

4

Approaches to legal and judicial reform in Pakistan: post-colonial inertia and paucity of imagination in times of turmoil and change

The previous two chapters empirically explored and highlighted several gaps and disconnects between the substance and operation of formal laws, the courts, and the legal administrative system in Pakistan on the one hand and Pakistani citizens' actual expectations from and differential experiences with these on the other. They argued that these disconnects are a result of various levels of historical and contemporary social, economic, and political disempowerments and alienations – vital areas of concern that have been consistently neglected in the Pakistani official law reform discourses. To further explore the merits of these assertions, it would be pertinent to scrutinize how justice sector reform was approached in the early decades after Pakistan's independence in 1947 up until the commencement of the more recent reform era, which in turn will be critically evaluated in the following two chapters. Such a close review ought to help one appreciate whether these early reform approaches had the potential to introduce meaningful changes in the legal/court system in order to enable it to cater more effectively to the general expectations of Pakistani citizens, and the specific needs of its more vulnerable and disadvantaged groups. However, before embarking on this analysis, it is important to preliminarily raise some fundamental questions about formal legal/court systems and their role in maintaining the political and economic status quo in a country – a role that may also directly assist toward maintaining a prevalent regime of differential access to resources, as well as an inequitable distribution of the same.

Law, the game of economic struggle, and the limitations of legal discourse

This section endeavors to question and demystify three commonly held assumptions about the background laws/rules and the overarching state legal system which provide the formal framework for court-based contestations in a society. These assumptions are that: (i) such background

laws/rules are neutral in terms of defining the distributive arrangements pertaining to resources in society as well as providing access and opportunities to different groups in society who are contesting the ownership of these resources and also the joint products of their endeavors; (ii) the state plays a neutral role in upholding and implementing these background laws/rules; and (iii) the courts are the appropriate arena for addressing any differential distributive consequences emanating from such background laws/rules.

Robert Hale's seminal work in the area of law and economics and his contribution to the social theory of law – "a theory about the distribution of wealth, income, power, and knowledge in capitalist society"[1] – inspired the development of the critical framework I use in this section. Hale's theory, as Duncan Kennedy describes well, highlights the large causal role that law, or rather the legal ground rules that structure bargains between competitive/cooperative groups, plays in the realm of distribution in society.[2] Hale challenges the three foregoing assumptions about background laws/rules as follows. First, he asserts that background laws/rules (in contract, tort, property, and even criminal law) are essentially "rules of the game of economic struggle" that "differentially and asymmetrically empower" different groups in society contesting products created through joint efforts.[3] Second, Hale questions the neutrality of the state in upholding and implementing these background laws/rules. And finally, he raises significant questions about the ability of the courts to address any differential distributive consequences emanating from such background laws/rules.

Regarding the first point, the actual and perceived role of background laws/rules in the differential and asymmetric empowerment of disparate groups in Pakistani society is explored at length in Chapters 2 and 3, and the empirical findings affirm Hale's important insight. As to the second point about the role of the state, Hale shows in his work how the state uses force to ensure obedience to the rules of the game of bargaining over a joint product, and how the state is, in fact, the author of the distribution, even though the eventual distribution of resources and benefits appears to be determined solely by the "voluntary

[1] D. Kennedy, "The Stakes of Law, Or Hale and Foucault!" in *Sexy Dressing etc. Essays on the Power and Politics of Cultural Identity* (Cambridge, MA: Harvard University Press, 1993), pp. 89–90.

[2] Kennedy, "Hale and Foucault," p. 90. [3] Kennedy, "Hale and Foucault," p. 83.

agreement" of parties.[4] Far from being a benign onlooker and a disinterested protector of "rights," the state, says Hale, is the actual custodian and protector of the underlying legal arrangements of a society.[5] In response, one could argue that the state's protection, for instance, of property rights, is essentially protection against any violent private interference with such rights. Hale, however, disagrees that state protection of property rights is non-interference, as the state, according to him, also forbids the "non-owner" from handling such property, even when it involves no violence whatsoever. Therefore, the state is not merely keeping the peace; it is also exerting "coercion" wherever necessary in order to protect owners from both violence and peaceful infringement of their sole and exclusive right to the thing owned.[6]

As to the third assumption regarding the suitability of court-based solutions to issues of differential distribution, Hale's analysis of particular legal rules in order to determine their effect on bargaining power – and thus on the distribution of income between the contesting groups – points to the difficulty of measuring different interests in the community.[7] There are also no simple rules to measure how conflicts between them should be settled.[8] Consequently, Hale is of the view that the supposedly neutral and objective "principles of justice" governing the courts do not suffice, and that they scarcely envisage the problem.[9] Accordingly, he thinks that economics needs to develop a method to measure change in human satisfaction resulting from increase in the production of one and decrease in the production of another article.[10]

[4] R. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Pol. Sci. Q.*, 38 (1923), 470, 470–1, 481. Hale warns against taking for granted the background legal rules for a given economic system. He deems it a "voluntaristic" fallacy to think that a laissez-faire system does not have coercive restrictions.

[5] As a corollary, if such arrangements are exploitative and breed discontent and strife, one cannot absolve their ultimate protector, i.e. the state itself, which quite paradoxically may simultaneously be undertaking projects to promote social harmony.

[6] See Hale, "Coercion and Distribution," pp. 472–3. He uses the term "coercion" in a value-neutral sense. Hale employs it as an analytical tool and his focus is on the actual power plays in society to which one can be blind due to the "fallacy of liberty" (p. 471). Understanding "coercion," Hale thinks, is vital because "the distribution of income … depends on the relative power of coercion which the different members of the community can exert against one another," and "the resulting distribution is very far from being equal" (p. 478).

[7] Hale, "Coercion and Distribution," p. 493.

[8] Hale, "Coercion and Distribution," p. 493.

[9] Hale, "Coercion and Distribution," p. 493.

[10] Hale, "Coercion and Distribution," p. 493.

At the same time, Hale is unconvinced that a mere "balancing program" can bring about a greater level of equality in the effectiveness of coercive weapons, between, say, the property owners and non-property owners.[11] Therefore, the need for supplementing any such "balancing program" by altering the legal arrangements themselves simply cannot be ignored.[12] This necessity, at times, to bring about an alteration of underlying legal arrangements in a society is a key theme. I have broached it in previous chapters, and I shall explore it further in my discussion of various Pakistani law reform approaches in this chapter.

To elaborate further on Hale's skepticism regarding the suitability of court-based solutions to issues of differential distribution, judicial notions of "economic justice" (with different judges adhering to different economic philosophies), Hale argues, are likely to create greater confusion if brought to bear on economic relationships between different members of the community.[13] Hale suggests that additional problems may arise when judges employ the "question-begging language concerning 'rights.'"[14] To support his contention, he points to the incapacity of traditional legal doctrine to tackle "market price" issues – with market prices merely perceived as showing the strength of bargaining power of a person who owns a property or a service – and the threats in most economic transactions to damage the other party, as well as the actual infliction of damage. Courts, says Hale, are unable to make the requisite inquiries and are incapable of furnishing remedies in these situations.[15] This is because the courts regard the economic motive of inflicting harm as normal bargaining, unless inflicted by means otherwise regarded as unlawful. For instance, while the courts may be receptive to recognizing the compulsion imposed on factory owners through labor strikes, they were not similarly receptive to recognizing the compulsion exercised by factory owners on their employees in order to prevent them from joining a union.[16] Pointing out the limitations of the courts in addressing issues

[11] Hale, "Coercion and Distribution," p. 481.
[12] Hale, "Coercion and Distribution," p. 481.
[13] R. Hale, "Prima Facie Torts, Combination, and Non-Feasance," *Colum. L. Rev.*, 46 (1946), 196.
[14] Hale, "Prima Facie Torts," 197.
[15] R. Hale, "Bargaining, Duress, and Economic Liberty," *Colum. L. Rev.*, 43 (1943) 603, 624–5.
[16] R. Hale, "Force and the State: Comparison of 'Political' and 'Economic' Compulsion," *Colum. L. Rev.*, 35 (1935), 149, 286. To illustrate the very different judicial treatment of "combined actions" by capital and labor, Hale points out that the courts do not probe the "omission" of declining to employ someone, even if the motive of the "omission" is a bad one. The mere existence of choice on part of someone facing unfavorable employment

of basic unequal distribution, Hale advocates planned government intervention in areas that can help the economically weak, asserting that, "there is no *a priori* reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty."[17] At the same time, he warns against the courts thwarting, in the name of "liberty" and "equality," any attempts by other organs of government to "increase and equalize the economic liberty of the weak."[18]

Hale's analysis may be open to two rather different interpretations. One possible reading of Hale is that he is not particularly concerned with the inequality of bargaining power or the lack of a level playing field in society, but that he essentially wants to question the intellectual rigor of the received concept of "equal bargaining power." "Bargaining" is a tool; it is a means to an end. According to this reading of Hale, one should closely observe the background rules in society, rather than just assume them. However, a different and closer reading of Hale suggests otherwise. According to this reading, it is unfair to perceive him as merely a keen but aloof observer. In fact, Hale does not merely care about bargaining configurations: he is also concerned about the outcomes. This is a Hale who advocates proactive legislative interventions to address uneven bargaining power, who critically examines existing (of his time) inheritance and government grant rules that, according to him, lead to the law endowing some with rights more advantageous than others. This is also a Hale who says that we could, if we wanted to, maintain "protection of property" and "freedom of contract" under a different set of rules, and that planned government intervention under these rules would not necessarily be inimical to economic liberty.[19] Surely, the choice of a very different set of background legal rules can have very different distributive outcomes, and very different resulting "property" and "contract" rights. Yet, one could still achieve, if it were the goal, a strict property rights protection regime and limited governmental interference with freedom of contract, "but a very different pattern of economic relationships."[20]

terms and a weak bargaining position does not mean that there is no duress involved in the situation.

[17] See Hale, "Bargaining, Duress, and Economic Liberty," 603, 628.

[18] Hale, "Bargaining, Duress, and Economic Liberty," 625.

[19] Hale, "Bargaining, Duress, and Economic Liberty," 627–8.

[20] Hale, "Bargaining, Duress, and Economic Liberty," 603, 628. One could say that Hale's approach to the multiple possible combinations and outcomes implicit in the terms "property" and "contract" has much in common with the Hohfeldian manner of analysis

The Hale of the second reading is also a Hale who is skeptical about any policies that perpetuate unequal redistribution in society and simultaneously attach their hopes for more equal distribution to a "trickle down" from the rich to the poor. He also finds much reason to doubt that market values truly reflect society's needs and should be allowed to exclusively drive production choices. He takes issue with the precedence given to the less pressing needs of the rich rather than to the more pressing needs of larger society. Hale calls this a fallacy because, according to him, the production choices of society are actually determined by coercive arrangements that affect important interests. Moreover, these arrangements are kept in place by the government, which can alter them greatly.[21]

Hale's denunciation of the belief that certain models of contract, property, and market relations determine optimal production decisions for society, and also eventually address its distributive disparities (for which the "voluntaristic" consent of all sections of society is an essential presumption), is a significant insight and one highly relevant to my ensuing review of Pakistani law reform approaches. Equally significant and relevant is Hale's observation that the state does not play a neutral, backseat role in resource distribution, as is his conclusion that the courts suffer from various limitations in adequately responding to the basic unequal distribution of bargaining power among individuals in a society – hence the necessity, according to Hale, for legislative intervention in order to address this inequality.[22]

Moving forward, I further draw upon Hale's insights to explore the fallacy of reform emphasis on "delay reduction" – a Pakistani judicial penchant that I shall explore in great detail in this and the following chapters. According to this fallacy, the metamorphosis of judges into highly efficient case disposal machines would not just reduce delay in legal adjudication, but also somehow address the complex and deep underlying reasons for social discord/disputes and recurrent and escalating court contestations. There seems little doubt in the minds of those who adhere to this approach that the courts are invariably the best place

of "property" and its deconstruction. See W. Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal*, 23 (1913), 16, 45.

[21] See Hale, "Coercion and Distribution."

[22] Hale's insights will provide a useful framework in my subsequent examination of "public interest litigation" in Pakistan which is justified by judges on the ground of legislative failure to meaningfully address issues of unequal distribution and asymmetrical bargaining power in society.

to resolve any disputes, more or less to the exclusion of other possible alternatives; and that judges and the legal discourse are the most suitable agents and interface for proposing solutions to disputes that may actually be the manifestations of highly contentious and divisive underlying economic and political struggles in society. This fallacy, I shall argue, leads to underutilization or complete exclusion of important economic, political, and legislative arenas, as well as multi-disciplinary perspectives for solving these problems. Thus, a utopia is constructed. The utopia constructed by this fallacy would have us believe that there is a straight path from proficient and well-incentivized judges to a legal system that works like clockwork, and that this linear progression leads to robust protection of private property, contract enforcement, and an efficient market economy. But that is not all! At the end of this triumphant journey on the road to Oz – as the mission statements of various rule of law (ROL) projects in Pakistan over the past decade boldly and, in my view, deceptively claim – there await us the rich and varied rewards of, inter alia, economic growth, social harmony, rule of law, general equity, distributive fairness, legal empowerment of the vulnerable, and that all-elusive mythical goal of justice.

Implicit in this fallacy are of course all the fallacies pointed out by Hale (outlined above). Collectively, these fallacies lead to a lack of recognition of the limitations of what courts can realistically achieve in divided and contentious societies. They cause one to pay inadequate attention to the existence, as is the case in almost all post-colonial contexts, of a political and economic system characterized and maintained by entrenched and hierarchical property, contract, and market arrangements that always militate against any move toward greater equality of bargaining power in society. Furthermore, they foster a myopia that impedes recognition of the existence of this system, which is actually bolstered, sustained and perpetuated by the courts and the legal system that provide legal cover and sanctity to its political and economic ethos. Throughout its history, the law reform agenda and debate in Pakistan have been debilitated by these blind spots. They have remained oblivious to or deliberately ignored the idea that the background rules protecting a system of inequitable distribution in society will continue to exacerbate the inequality of distribution, even if seemingly playing an inert, neutral, and inactive role. It is only through meaningful change in these fundamentally important background rules that there can eventually be any visible impact on distributive patterns, and a possible shift toward a more equitable dispensation. And although the current patterns of distribution

in Pakistan are far from equal, the all-important legal ground rules continue to be ignored. In Duncan Kennedy's words: "The invisibility of legal ground rules comes from the fact that when lawmakers do nothing, they appear to have nothing to do with the outcome."[23] However, apparent inaction also begets a deliberate policy. According to Hale, all competition is legalized injury: "Once there is a legal system, the choice of any particular set of background rules is a choice of a set of distributive outcomes, whether achieved through many rules or only a few."[24] Against this backdrop, the next section attempts to situate the various historical and current law reform approaches in Pakistan within Hale's critical framework.

A typology of law reform approaches in Pakistan

If one were to develop a typology of the various law reform approaches in Pakistan over the past six decades or so, in order to serve as a useful analytical framework, I would propose the following:

- specific-issues-based incremental amendment approaches;
- institutional malaise approaches;
- efficiency plus approaches;
- human capital development approaches;
- Islamization of laws and legal system approaches;
- judicial activism approaches; and
- access to justice as a function of access to economic and political empowerment approaches.

Although these approaches reveal certain variations in their assumptions, priorities, and methodologies toward law reform, I aim to draw out a fundamental similarity between them. My relatively short descriptions of these approaches in my proposed typology are by no means exhaustive. They encompass complex debates, structures, and implementation mechanisms. All of them merit further independent and exhaustive analysis. However, I have attempted to capture their essence, design, and prominent characteristics in order to gauge whether any of these approaches actually engaged with the important underlying structural and societal dimensions of legal disputes, while proposing specific reforms of the Pakistani legal and judicial system.

[23] See Kennedy, "Hale and Foucault." [24] Kennedy, "Hale and Foucault," p. 92.

The specific-issues-based incremental amendment approaches

There is no paucity of indigenous Pakistani Law Reform Commission/Committee reports that have historically attempted to diagnose the ills of the Pakistani legal and judicial system, and recommended various palliatives.[25] In my view, these various commissions and committees share the following features: (i) The various ad hoc Pakistani Law Reform Commissions/Committees, as well as Pakistan's permanent Law Commission, have approached legal and judicial reform in a piecemeal fashion. That is to say, they have zeroed in on certain recurring glitches and "problems," emerging due to what they perceive to be a less than optimal functioning of the Pakistani legal system. Identifying particular shortcomings in specific laws and procedures, they have gone on to offer narrow legal or procedural amendments as solutions. In this context, they have, by and large, embraced the existing legal and judicial system as an acceptable and potentially workable framework. (ii) In terms of their findings, the commissions/committees have found the "problems" impeding the legal/judicial system to be inherently the logical manifestations of inadequate implementation of existing rules and regulations. That is to say, they do not identify any deeper and more complex design or structural constraints shackling the legal/judicial system; or for that matter, any gaps between popular aspirations and expectations from the law and the ethos, philosophy, and practices of the Pakistani legal/judicial system. This explains why their recommendatory reports have essentially advocated the following as a sufficient antidote: judicial capacity building; boosting of infrastructural and administrative support for judges; stringent application of existing rules/

[25] The Law & Justice Commission of Pakistan website lists the following commissions and committees that have analyzed the Pakistani legal and judicial system and prepared recommendatory reports in the past: (i) Commission on Marriage and Family Law 1956; (ii) Quetta and Kalat Laws Commission 1958; (iii) Law Reform Commission 1958; (iv) Law Reform Commission 1967; (v) High Powered Law Reform Committee Report 1974; (vi) Law Committee for Recommending Measures for Speedy Disposal of Civil Litigation 1978; (vii) Secretaries' Committee Report 1979; (viii) Salahuddin Ahmed Committee 1980; (ix) Pakistan Women's Rights Committee 1976; (x) Commission on the Status of Women Report 1985; (xi) Commission on Reform of Civil Law 1993; and (xii) Commission of Inquiry for Women Report 1997. The permanent Law & Justice Commission was set up in 1979. However, in its essence, tone and tenor, ambit and focus, and the substantive tilt of its recommendations, it is very similar to the ad hoc law commissions/committees of the past. See www.ljcp.gov.pk/Menu%20Items/Publications/Summary%20of%20reports%20of%20Ad%20hoc%20Commissions/3-summary%20of%20reports%20adhoc%20commissions.htm.

regulations for ensuring delay reduction; and occasional tinkering with civil and criminal procedures, the law of evidence, and other rules and procedures. Significantly, the colonial genealogy and continuing relevance of various Pakistani laws is neither really discussed nor seriously questioned in these reports. (iii) At times, some of the commissions/committees have also specifically focused on equity issues and the predicament of "vulnerable groups" (such as the committees focusing on women's rights) as a separate and special area of concern. However, the relevant issues have once again been contextualized, analyzed, and addressed within the overarching design and framework of the existing system. (iv) Some of the reports have reiterated the recommendations from previous reports, and quite a few have blamed the lack of implementation of the recommendations by their predecessors on governmental apathy, lack of political will, and/or lack of political stability in the country. (v) At times, lack of implementation has also been attributed to unfavorable reception of reform recommendations on part of the "litigating public," as well as by members of the "bench and bar." On other occasions, commissions have stated that any radical systemic or legal changes are actually far from necessary. In this context, it is pertinent to note that the 1958 Law Reform Commission concluded "that radical changes were not desirable in the existing judicial system because the people by and large had become accustomed to the technicalities of the existing procedure, followed by the courts."[26] Similarly, the Law Commission Report of 1993 reiterated the views expressed by earlier commissions/committees and stated that the existing procedural laws/rules were generally sound and needed no major surgery.[27] Occasionally, some committees, such as the Salahuddin Committee of 1980, recommended some structural changes to the system – such as replacing the adversarial system of litigation with what it described as the "*amicus curia* system," as well as a greater move toward alternative means of dispute resolution.[28] Evidently, this unconventional thinking did not get much mileage and the attempt is of essentially archival interest today.

The fact that most of the recommendations made by these commissions/committees remained either unimplemented or were withdrawn

[26] "Report of the Law Reform Commission 1958–59" (Karachi: Government of Pakistan, Ministry of Law, 1959).
[27] "Report of the Law Reform Commission 1958–59."
[28] "Report of the Law Reform Commission 1958–59."

(and even when they were implemented they seem to have made little difference toward boosting the efficiency of the legal/judicial system) means that they have left no lasting impact, in terms of how the Pakistani legal/judicial system currently functions. It is not surprising that most of these commission/committee reports are not even publicly accessible today, let alone acting as the lynchpins of ongoing policy dialogue. Ironically, while not being readily visible themselves, they have invariably advocated reforms leading to transparency in governance. In summation, their utility is reduced to official documentary bean-counting in order to convey a false sense of sustained governmental commitment to reform over the years.

The institutional malaise approaches

While the judges and lawyers authoring the aforementioned reports have been largely content to look at Pakistani laws and legal processes in isolation from their wider social and political contexts, other reform approaches have attempted to determine the role and impact of the latter. Emanating from multidisciplinary perspectives of law, political science, and history, these macro "institutional malaise approaches" identify, highlight, and analyze the disruptive impact of various political and state structural factors on the functioning of the Pakistani legal and judicial system. They highlight, inter alia, the frequent undermining of the Pakistani Constitutional ethos due to the acute democratic displacement caused by recurrent military coups. In such a milieu – where the country has been under direct military rule for more than half of its existence – Pakistan's justice system and its legal community have remained or, as they argue, have been kept, in a state of arrested development.[29] In addition, they highlight the escalating politicization of the Pakistani judiciary due to its persistent and unenviable predicament of having to rule over the legality of highly politically contentious disputes.[30] Furthermore, they ascribe the sorry state of affairs of the Pakistani legal education system to historically low levels of funding and also to consistent governmental neglect of public law schools due to its apprehension of the active pro-democracy lawyers.[31] In addition to

[29] See Siddique, "Jurisprudence of Dissolutions."
[30] Siddique, "Jurisprudence of Dissolutions."
[31] See Siddique, "Martial Laws and Lawyers." See also R. Braibanti, *Chief Justice Cornelius of Pakistan* (Oxford University Press, 1999), pp. 111–13.

this, they focus on the historical underdevelopment of certain key areas of law such as, inter alia, the tort liability regime and its debilitating impact in terms of the non-availability of important legal remedies to Pakistani citizens.[32] They argue that the world's seventh nuclear power is a geo-politically significant but highly unstable state with a weak democratic culture and growing inner fissures caused by political obscurantism, religious radicalism, economic stagnation, institutional decline, and growing lawlessness.[33] These factors, they argue, have also led to increased private co-option and abuse of certain problematic laws, religious vigilantism, and frequent and unpunished violation of minorities' rights.[34]

The upshot of these narratives is that, in this chaotic context, the Pakistani judicial system finds itself overburdened and incapacitated. This has also been caused by the system's regressing quality and professionalism due to the growing politicization of the appointments and functioning of its judges. The "institutional malaise approaches" call for a close review of the criteria and process of judicial appointments and the processes of removal, judicial accountability, judicial performance evaluation, judicial security of tenure, and financial security for judges.[35] While these approaches invariably do not focus on law reform at a finer level of detail, what they essentially hold is that several features of the larger political and state structure, as well as important institutional processes, have to undergo change before any service delivery improvements can take place. However, while questioning the underlying institutional edifice and its corrupt political economy, these approaches do not necessarily always offer deeper structural and institutional alternatives with any great specificity. The point of departure for these approaches, like the other law reform approaches in Pakistan, essentially remains the received legal and judicial system in a post-colonial setting.

[32] See generally M. Khan and O. Siddique, "The 2005 South Asian Earthquake: Natural Calamity or Failure of State? Exploring State Liability and Remedies for Victims of Defective Construction in Pakistan," *Asian Law*, 9 (2007), 187.

[33] See O. Siddique and Z. Hayat, "Unholy Laws & Holy Speech: Blasphemy Laws in Pakistan – Controversial Origins, Design Defects and Free Speech Implications," *Minn. J. Int'l L.*, 17 (2008), 303.

[34] Siddique and Hayat, "Unholy Laws & Holy Speech."

[35] See The International Bar Association Human Rights Institute (IBAHRI), "A Long March to Justice: A Report on Judicial Independence and Integrity in Pakistan" (September 2009), www.ibanet.org/Document/Default.aspx?DocumentUid=F0F99EB4-C9AC-4543-BD8A-57817D3F05C2.

Nevertheless, given that the proponents of these approaches take a broader and longer-term view of things, at least they contain the potential to question the received ethos and structure of the Pakistani legal and judicial system at more fundamental levels.

The efficiency plus approaches

The "efficiency plus approaches" have been the most prominent and characteristic recent approaches to justice sector reform in Pakistan. The term refers to the several international, multilateral, and bilateral ROL reform projects that have dominated the Pakistani reform landscape over the past decade-and-a-half – they are discussed and critically evaluated at length in Chapters 5 and 6. I call them "efficiency plus approaches" for two reasons.[36] First, because at a theoretical level, they equate the pursuit and achievement of performance "efficiency" with the addressing of more complex "equity" and "distributional" issues pertaining to and implicit in justice delivery. Second, despite their use at times of a pro-poor and pro-vulnerable groups rhetoric, the real underlying focus of these approaches has essentially been fixated on the general "efficiency" enhancement of the courts and the judicial process in order to ensure smoother functioning and growth of a market economy.

A telling insight into the efficiency plus approaches is provided by the following statement of the ADB's Access to Justice Program's (AJP's) official "rationale" (AJP will be discussed at length in the next chapter):

> Vulnerability, justice, and entitlements are closely linked. Vulnerability is a function of insecurity of access to key sets of material, social, political, and environmental assets. Justice is a function of the relationship between institutions responsible for delivering entitlements (public goods and services) predictably, affordably, and accountably, and the ability of citizens to secure and sustain their access to key sets of assets. The pro-poor rationale of this Program assumes that efforts to limit the vulnerability of the poor to the vagaries of systems of administrative, political, civil, and criminal justice are at least as important as macroeconomic

[36] The inspiration for this term has come from the expression "Economic Growth +" used by David Kennedy to describe the pursuit of an economic growth policy that primarily focuses on following the so-called "best practices" of efficient economies, while putting on the backburner any meaningful consideration of the more contested and complicated distributive dimensions of any economic policy. See D. Kennedy, "The Rule of Law, Political Choices, and Development Common Sense" in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge University Press, 2008).

> performance in poverty reduction. *In addition, the present legal framework and the performance of judicial institutions significantly constrain market-based economic growth, and in particular hinder foreign direct investment as well as the growth of small and medium-sized enterprises.*[37]

In my view, the above rationale has two striking features. First, the idea of a rescue plan of sorts for the "poor" from their "vulnerability" to an insensitive justice system is juxtaposed against an admission of the living reality of their continuing entrapment in poverty. This could be taken to mean that the existing system of "administrative, political, civil, and criminal justice" inherently sustains and perpetuates an uneven playing field where the poor always lose out due to the entrenched institutional and systemic bias they have to face. A "leveling" of this playing field thus ought to be the real "pro-poor" impetus of reform. The other possible interpretation, however, is that the slowness and inefficiency of the justice system has an adverse impact on all citizens. However, the poor are additionally open to harm, exploitation, and abuse, as they particularly lack the economic resources and liberty to effectively vindicate their claims in courts of law. More efficient courts would, therefore, benefit everyone – even the poor. However, it is evident that they are not the only, or even the most important, beneficiaries of the intended reform, as evident in the clear highlighting of the interests of "market-based economic growth," "foreign direct investment," and "small and medium-sized enterprises." In other words, the poor are joint beneficiaries of reform endeavors, together with the holders of all existing commercial and market interests. It is unclear whether they are claimants on an equal footing or merely the residual beneficiaries of the eventual "trickle down" boons of a more efficient judicial system. Even if they are acknowledged to possess an equal claim with the rest, is there not a very real possibility that they will be pushed to the very end of a rather long queue of claimants, given the much greater resources at the disposal of the commercial and market interests? In addition, is it not likely that a further entrenchment of existing commercial and market interests may contribute toward the perpetuation of the larger socio-political and economic milieus in which the poor find themselves increasingly "vulnerable?" Would more "efficient" courts – courts that resolve legal disputes more

[37] ADB, "Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program" (November 2001), www.adb.org/Documents/RRPS/PAK/rrp_32023.pdf. (Emphasis added by author).

quickly and more predictably – be able to necessarily change anything when it comes to issues of "equity" and "distribution?" Or would the courts – in various ways, directly or indirectly – worsen the situation for the poor by placing a premium on "efficiency" and "predictability," as that would in all probability lead to further structural strengthening of the status quo and thus to less propensity on their part to rock the boat? These highly relevant questions have, however, been largely left unanswered by the efficiency plus approaches.

Inefficiency and unpredictability after all may be the inevitable outcome, at least for a period of time, of any judicial endeavors to question the basic underlying socio-economic and structural causes for the low access to justice of the vulnerable and the historically disempowered. But that would definitely not be conducive to the timely realization of the goals of "market-based economic growth," greater "foreign direct investment," and the flourishing of "small and medium-sized enterprises." After all, who would want to invest in a country if its fundamental property rights regime is under question? The efficiency plus approaches enshrine many such fundamental questions and paradoxes.

A close review of the efficiency plus approaches such as the Access to Justice Program (AJP) reveals that these questions and paradoxes remain unaddressed – not just at the theoretical and ideological levels, but also at the levels of operation and implementation. This allows AJP and similar reform endeavors to be open to the critique that the poor, vulnerable, and historically disempowered are meant to be nothing more than residual claimants to what are essentially legal reforms for the protection and promotion of free-market-economy-based contract and property rights. That is if indeed it is even possible for the poor, vulnerable, and historically disempowered to remain residual claimants, given the intense competition among different stakeholders in any justice system for limited resources, precious court time, shifting official priorities, and fleeting judicial attention. After all, is it far from the truth that the most prolonged, divisive, and complex societal and legal disputes entail contests over access to key sets of material, social, political, and environmental assets? Are not courts often the central arenas, where the poor, vulnerable, and historically disempowered frequently find themselves occupying opposite sides of the battle lines to the strong interest groups vested and invested in economic growth and foreign direct investment? How could "efficiency" of the justice system then be the primary reform goal, and how could it address deeper conflicts and contestations in society? The efficiency plus approaches to justice sector reform in Pakistan have

essentially sidestepped these vital questions. Furthermore, they have focused instead on the comparatively more superficial aspects of the deeper problems facing the justice sector. Their reform areas of choice have included, inter alia, the poor physical infrastructure of courts, the inefficiency of court processes, and the inadequate salaries, incentive structures, etc. for judges. Implicit in these approaches is the notion that the law as it exists contains, by and large, all the solutions to and the necessary safeguards against the various problems and exploitations faced by the poor, vulnerable, and historically disempowered. Consequently, they proceed with the assumption that by assuring better "access" to courts through more "efficient" judges, a bridge can be built in order to reach the hitherto elusive "entitlements" and the evasive "equal protection under the law."

Another obvious shortcoming of these approaches has been their comparatively limited and narrow emphasis on the human variable in the justice equation, i.e. the judges themselves. They have assumed that a better-paid judge sitting in a more comfortable courtroom and following a more efficient regime of case disposal would metamorphosize into not just a more "efficient" judge, but also a more "competent" and "equitable" one, with hardly any rigorous examination of what such trickle-down equity might amount to, even if it actually transpires. This conveniently unnuanced visualization of the judge as a monolithic, homogenous, and predictable machine-like instrumentality is of course highly problematic. Sanitized and aloof from the corrosive influence of any potential biases, inclinations, pressures, and prejudices stemming from the judges' social, economic, class, and educational backgrounds – which may be staunchly pro status quo and hence protective of existing social and political hierarchies – the efficiency plus approaches have simply imagined or hoped for pro-poor reforms, rather than having meaningfully engaged with the more difficult question of how such reforms would actually materialize. Such incognizance of the systemic and institutional ideologies, politics, impetus, constraints, and varied impacts of a judicial system has been a glaring omission on the part of these approaches.[38] They have been equally

[38] See, e.g. D. Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, MA: Harvard University Press, 1997) for its lucid explorations of the various sociological and psychological aspects and implications of adjudication; in particular, the question of how politics affects judicial activity and how, in turn, law-making by judges affects politics in the American context. For further philosophical exploration of the phenomenon of judicial decision-making, see D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *J. Leg. Ed.*, 36 (1986), 518.

oblivious of the significant contributory role of legal education toward creating foot soldiers in the service of an entrenched political and economic system, which in itself may be the root cause of poverty, vulnerability, exploitation, and distributive injustice. By downplaying the complexity of the "human factor" in justice delivery, the efficiency plus approaches have thus neglected the significance of the nature and ideology of the education and training that leads to the eventual creation of lawyers and judges who operate a legal and judicial system. They have also omitted to take note of the prominent critical evaluations of this vital nexus in other leading international legal jurisdictions.[39] In the Pakistani context, the efficiency plus approaches have to date achieved very limited success in enhancing judicial efficiency. As to the "plus" part – which was negligible to start with – that has more or less withered away without a whimper after the initial rhetorical sound and fury.

The human capital development approaches

As to their fundamental point of departure, the "human capital development spproaches" are similar to the "efficiency plus approaches." They also proceed with unquestioning acceptance of the design and structure of the existing legal and judicial system. They too are focused on enhancing the "efficiency" of its output. Their distinctiveness lies, however, in their somewhat greater stress on also improving the qualitative dimension of the judicial output. Not dissimilar to the efficiency plus approaches, they attribute the sub-optimal quality of judicial output to inadequate physical infrastructure and staff. However, they also lay great emphasis on the historically poor salaries, inadequate incentive structures, and lack of meaningful training opportunities for trial court judges. According to these approaches, the judges of the courts of first instance have been consistently under-funded, under-trained, and over-burdened

[39] See D. Kennedy, "Legal Education and the Reproduction of Hierarchy," *J. Leg. Ed.*, 32 (1982), 591 and *Legal Education and the Reproduction of Hierarchy: A Polemic against the System* (New York University Press, Critical America, 2004). Kennedy has spearheaded an incisive ongoing debate that focuses on the ideological and structural impetuses and biases in the US legal educational system in the training of lawyers toward adopting roles of unquestioning service toward existing patterns of domination and hierarchy in American society, to the exclusion of other possibilities of legal and political practice. One important part of the American law school training, according to Kennedy, is to create willing service providers for the hierarchies of a corporate welfare state.

with work – the unsurprising outcome is that it is those at the very bottom of the available talent pool who typically opt for careers in the lower judiciary.[40]

The human capital development approaches point out that all of the Pakistani provincial and federal governments have historically allocated less than 1 percent of their respective budgets to the judiciary, which, they argue, amply demonstrates its low prioritization and neglect.[41] They report that despite the dampening impact on the morale and performance of the Pakistani district judiciary caused by meager salaries, inadequate facilities, poor working environment, negligible training, low social status, and overwhelming workloads, meaningful reforms have not been forthcoming.[42] However, even though these approaches underscore "training" and "capacity development," they largely visualize it in a fairly inert and mechanical sense – emphasizing essentially the development of better court and case management skills toward achieving delay reduction.[43] Therefore, as it turns out, their eventual reform prescriptions are not dissimilar to those offered by the efficiency plus approaches. Consequently, and for identical reasons, both approaches fail to rigorously address how exactly better salaries, incentives, and training in such a narrow sense would resolve the multiple equity, vulnerability, and distributive concerns of several disadvantaged groups in society – how would such efficiency-oriented streamlining automatically translate into the overall qualitative improvement of judicial output?

The other prominent omission by the human capital development approaches is that while stressing the training needs and quality issues of the district judiciary, they do not extend the same prescription for the appellate judges, despite lowering standards at the upper levels of the judiciary. This omission is all the more glaring in a context where the Pakistani appellate judiciary has habitually displayed resilience to ideas of further training and professional upgradation, quite often branding the same as contemptuous of the judiciary and a violation of its independence. The appellate judiciary's hostility to any attempts to reform its

[40] Bhandari & Naqvi, *Country Study: Pakistan* (Islamabad: The Asia Foundation & ADB Judicial Independence Project, 2002). See also ADB and Pakistan Ministry of Law, Justice & Human Rights, *Strengthening the Subordinate Judiciary in Pakistan* (1999).

[41] Bhandari & Naqvi, *Country Study*, p. vi.

[42] See *Strengthening the Subordinate Judiciary* report.

[43] L. Armytage, "Pakistan's Law & Justice Sector Reform Experience – Some Lessons," Commonwealth Law Conference (Melbourne: April 14, 2003),www.educatingjudges.com/Hyperlinks/PakistanADBProjectLessonsLearned.pdf.

eligibility, appointment, performance evaluation, and removal mechanisms under the Constitution was clearly evident in the imbroglio surrounding the introduction of the Eighteenth and Nineteenth Amendments to the Constitution (discussed in the introduction to this book). Such hostility was additionally problematic due to the deep controversies that have surrounded: the hitherto low constitutional qualification bar for appointments to the appellate judiciary in Pakistan; the absence of a legislative role in such appointments; the various conundrums as to the precise role of the executive and judiciary in the appointment process; the overall mystique surrounding the exact steps and requirements of the appointment process; its consequent opaqueness to public and academic scrutiny; the largely dysfunctional extant mechanism for the removal of appellate court judges for incapability or misconduct; and historical evidence of various political agendas or self-preservation motivations, at times, determining appointments to appellate courts and the pursuit of court-packing through the nomination of politically loyal and ideologically acceptable candidates for judicial positions. As a result, serious questions have been raised over the years about the quality and impartiality of the Pakistani appellate judiciary.[44] The human capital development approaches' have, however, invariably sidestepped these very important questions.[45]

The Islamization of laws and legal system approaches

The "Islamization of laws and legal system approaches" (hereinafter, "Islamization approaches") were predominantly visible and thriving during General Zia-ul-Haq's military regime spanning the years 1977 to 1988. Thus, they cannot be decoupled from the larger political context of Zia's martial law and his subsequent attempts to entrench his regime through the adoption of "Islamization" as a political philosophy and a strategy of rule. Zia's Islamization program operated both at the level of introducing certain fundamental structural changes to the judicial system and the so-called Islamization of particular laws. To furnish ideological oversight and justification, an Islamic Ideology Council was formed 6 weeks after Zia's coup in 1977. It was entrusted with the task of preparing the outline of an Islamic state and also had a

[44] See O. Siddique, "Judicial Appointments and Accountability: A Flawed Debate," *The Friday Times*, March 12, 2010.
[45] See Bhandari & Naqvi, *Country Study*.

panel on Islamic law.[46] One of Zia's most important steps toward the Islamization of the legal system was the creation of a parallel judicial apparatus, comprising the Federal Shariat Court (FSC) and the Shariat Appellate Bench of the Supreme Court (SAB).[47] The FSC – a practically supra-constitutional body – was authorized and mandated to ensure the conformity of all legislation with the Quran and Sunnah, and to strike down any law that it considered repugnant to either or both.[48] Moreover, an appeal against a decision of the FSC was made possible only to the SAB.[49] The composition of both the FSC and SAB cemented the formalization of the role of the "*Ulema*" (Islamic religious scholars) in the existing judicial system.[50] The FSC was also used and perceived to be used, at times, to push upstairs any independent-minded judges of the high courts, and hence served a potent role toward "taming" such judges.[51]

Apart from alterations to the structure of the judicial system, the enactment of the controversial blasphemy laws and the equally contentious *Hudood* (Islamic criminal) laws for governing various aspects of private conduct and personal morality were also a very important part of Zia's Islamization program.[52] Significant changes were

[46] O. Noman, *The Political Economy of Pakistan 1947–85* (London: T. J. Press; New York: Kegan Paul International, 1990), p. 118.

[47] See Pakistan Constitution, Arts. 203-C(1) at 142 and 203(F)(3) at 149.

[48] Pakistani Constitution, Arts. 203-D(1) and 203-D(3) at 146–7.

[49] Pakistani Constitution, Art. 203-F(1) at 149.

[50] Pakistani Constitution, Arts. 203-C(3A) at 143 and 203F(3)(a) and (b) at 149–50. The composition of the FSC and SAB ensured the adoption of a conservative, at times retrogressive, as opposed to modern and progressive interpretation of the Quran and Sunnah.

[51] See H. Khan, *Constitutional and Political History of Pakistan* (Oxford University Press, 2001), pp. 638, 641. In effect, the FSC indirectly performed legislative functions by: (i) reviewing existing laws in order to determine if they were in conformity with the *Sharia* and declaring as such if they found them in contradiction, in which case such laws ceased to exist after a stipulated time period; and (ii) laying down guidelines and formulations for the legislature for amending existing laws or enacting new ones. The FSC thereby played a significant role in the promulgation of various criminal laws under Zia (ibid.).

[52] The Hudood Laws were enacted through four Presidential Ordinances and one Presidential Order, namely, Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), reprinted in 31 PLD 1979 Central Statutes 51 (1979); Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979), reprinted in 31 PLD 1979 Central Statutes 56 (1979); Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), reprinted in 31 PLD 1979 Central Statutes 44 (1979); Execution of the Punishment of Whipping Ordinance, 1979 (IX of 1979), reprinted in 31 PLD 1979 Central Statutes 60 (1979); and Prohibition (Enforcement of Hadd) Order, 1979 (IV of 1979), reprinted in 31 PLD 1979 Central Statutes 33 (1979).

made to the law, which were repeatedly questioned by moderate and liberal elements in society, human rights groups, and diverse political and legal commentators. Critics of Zia's new "Islamic" laws raised several incisive questions about their Islamic legitimacy at a theological level and also highlighted their operational defects and vulnerability to abuse. They condemned the introduction of new punishments such as stoning to death, amputation, etc. that could be meted out as a consequence of prosecutions, trials, and convictions under laws that suffered, as they strongly argued, from several substantive and procedural issues, thus creating tremendous possibilities for injustice. The overarching lack of confidence in the integrity and telos of Zia's Islamization-oriented legal and judicial reforms, however, stemmed from the larger and scathing political critique of his rule and various actions as inherently *mala fide* and motivated by imperatives of regime legitimization. Zia's legal reforms were thus deemed, to use the metaphor in a somewhat different connotation from its commonly accepted legal nuance, the fruit of the poisonous tree. To their many detractors, Zia's reforms severely lacked the basic integrity and commitment to promote either Islam or good laws. Furthermore, they left no room for deliberation, dialogue, and dissent. This was both due to the fact that Zia's authoritarianism simply did not allow it, and also because it was considered pointless to acknowledge them as a framework for discussion, tainted as such interventions were by their ignoble underlying objective. Zia's intrusions into the legal and judicial spheres continue to be widely criticized as the supporting pillars for an illegal and oppressive regime – with "Islam" used as a mendacious justification for its illegality and oppression – and not as a serious and sincere alternative ethos or vision for actual legal and judicial reform. The notion of "Islamization" was also abused by Zia as a handy tool – and was a leitmotif of that period – when he wanted to thwart any legitimate opposition to his rule and policies. Quite conveniently for Zia's ulterior purposes, such opposition could simply be labelled un-Islamic and thus ignored. It is, therefore, unsurprising that Zia's "Islamic" laws are still perceived in popular and specialized discourses as part of a larger pattern in which the subjugation of democratic legislation and independent adjudication to political expediency subverted the processes of justice in Pakistan.

Critics have also laid bare several of Zia's laws as highly discriminatory against the rights of women, and inherently retrogressive and unrepresentative of what they consider to be the true spirit of

Islam.[53] Women's rights groups in Pakistan and abroad in particular have continued to regularly document, analyze, and protest against these laws. Their critique has emerged both from a doctrinal and ideological perspective, as well as through exhaustive empirical assessments of the several controversial aspects and manifestations of these laws.[54] Given all this, it comes as no surprise that while some of Zia's interventions continue a highly controversial life three decades after their genesis, it is only the fragility of subsequent political governments – and not any palpable and organized public support for the same – that extends them a lease of life.[55]

In fact, there has been rearguard action on part of judges who favor a less religiously dominated interpretation of the laws and the Constitution. The most illustrative example of this is the Supreme Court jurisprudence deliberating the constitutional reading of one of Zia's elevated "Islamic" provisions, i.e. Article 2-A of the Constitution. The language of the current Article 2-A was originally enshrined in what is referred to as the "Objectives Resolution," which acted as the preamble, albeit

[53] See, e.g. C. H. Kennedy, "Islamization and Legal Reform in Pakistan, 1979–1989," *Pacific Affairs*, 63(1) (1990), 62, 72. See also A. Jahangir and H. Jilani, *The Hudood Ordinances: A Divine Sanction?* (Lahore: Sang-e-Meel Publications, 1990), pp. 18, 21–2, 32–3. The authors castigate Zia's Islamization of laws as an attempt to consolidate his power; analyze the adverse impact of these laws and their implementation mechanisms in an equally adverse socio-political and legal environment; and comment on how the extension of religious sanctity to these laws makes any criticism of the same as being tantamount to heresy.

[54] See F. Gardezi, "Nationalism and State Formation: Women's Struggles and Islamization in Pakistan" in N. Hussain, S. Mumtaz, and R. Saigol (eds.), *Engendering the Nation-State* (Lahore: Simorgh Women's Resource and Publication Centre, 1997), p. 79. See also S. G. Khattak, "Gendered and Violent: Inscribing the Military of the Nation-State" and S. Toor, "The State, Fundamentalism and Civil Society" in Hussain et al., *Engendering the Nation-State*, pp. 38 and 111 respectively. See also A. M. Weiss, "Women's Position in Pakistan: Socio Cultural Effects of Islamization," *Asian Survey*, 25 (1985), 863, 876–7.

[55] For a brief period in the 1980s, a revisionist judiciary questioned the continuing application by Pakistani courts, at times, of the colonial doctrine of "justice, equity, and good conscience." It also noted a growing judicial trend to apply Islamic laws and principles where extant statutory law was silent or open to interpretation. It went on to actively prescribe this alternative approach. Had this trend continued, it would have been interesting to observe a possible judicial revisiting of the various colonial features of the Pakistani legal and judicial system, while employing an alternative "Islamic" ethos and methodology. Subsequent years have, however, demonstrated that this kind of thinking has lost momentum. See *Haji Nizam Khan v. Additional District Judge*, Lyallpur, PLD 1976 Lahore 930.

controversially, to previous Pakistani constitutions.[56] Zia, however, uplifted it to become an operative part of the current Constitution in the shape of Article 2-A, in order to unequivocally redefine the ethos of the Constitution as non-secular.[57] A series of Supreme Court cases, during and soon after Zia's rule, held probing discussions on whether Article 2-A was at par with the other provisions of the Constitution or whether, due to its broad, overarching, and all-encompassing content, tone, and tenor, it ought to be looked upon as the *grundnorm* of the Constitution. An important implication of the latter reading was that Article 2-A could then potentially trump any "conflicting" provisions of the Constitution on the litmus test of whether they were in violation of Islam. Consequently, it could bestow vast powers on judges willing to interpret and employ it as such.

However, more recent Pakistani judgments have put to rest the argument that Article 2-A can trump other constitutional provisions. They have declared instead that it stands on an equal footing with other provisions of the Constitution.[58] As a matter of fact, they have firmly precluded and strongly advised against an interpretation of Article 2-A which would raise it to the pedestal of a litmus test for gauging, evaluating, and potentially becoming a justification for striking down any other constitutional provisions. While acknowledging that various constitutional provisions may be inconsistent with Article 2-A, the courts have clearly warned that such an interpretive approach would undermine the entire Constitution.[59] Notwithstanding the above, in other court judgments, Article 2-A is frequently used for bolstering the courts' stated commitment to the larger notions of justice and morality that permeate the Constitution.[60] At the same time, Zia's Islamization ethos also

[56] I am referring here to the Constitutions of 1956 and 1962 and the unamended version of the Constitution of 1973.

[57] Pakistan Constitution, Art. 2-A makes the Objectives Resolution a part of the substantive provisions of the Constitution. The controversial Objectives Resolution was opposed by all of the non-Muslim members of the Constituent Assembly at the time of its adoption in 1949, due to what they regarded as its overtly religious tone. It starts with the words, "Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust," and extends protection to the Fundamental Rights under the Constitution subject to "law and public morality."

[58] See *Sharaf Faridi v. The Federation of Pakistan*, PLD 1989, 430, 452.

[59] See *Hakim Khan v. Government of Pakistan*, PLD 595, 612, 617, 620, 634–5 (1992) (Pak.). See also *Zaheeruddin v. The State*, SCMR 1718 (1993) (Pak.).

[60] See Dr. Faqir Hussain, *Public Interest Litigation in Pakistan*, PLD 72, 77 (1993) (Pak.).

continues to sporadically influence some judges in invoking Islamic principles and common law in order to fill statutory gaps.[61] However, as an alternative model of legal and judicial reform, it is safe to say that it has neither any prominent champions, nor any considerable political or popular backing in contemporary Pakistan.

The judicial activism approaches

The underlying ethos of the "judicial activism approaches" can be traced back to the "public interest litigation" movement that emerged in Pakistan in the late 1980s in the wake of a similar phenomenon in neighboring India.[62] In what may seem as highly unusual to observers in other jurisdictions, this unique phenomenon is characterized by activist judges revisiting, relaxing, and amending the existing trial systems and procedures, and hence also their own conventional roles in trial adjudication. The stated underlying intent is for judges to actively intervene and adjudicate in areas where they come across unacceptable levels of social injustice and persecution.[63] Justifying this innovative approach, its

[61] See M. H. Khan, *Public Interest Litigation: Growth of the Concept and its Meaning in Pakistan* (Karachi: Pakistan Law House, 1993), pp. 48–53.

[62] A seminal article evaluating the emergence of this phenomenon in India is U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India," *Third World Legal Studies*, 4 (1985), 107. Baxi argues that this phenomenon, which emerged in the late 1970s, is very much distinguishable from the public interest movement that occurred in the United States. He is of the view that unlike the US movement that focused on "civic participation in governmental decision making" and was geared toward "greater fidelity to the parlous notions of legal liberalism and interest group pluralism in an advanced industrial capitalistic society," the Indian movement was directed against "state repression or governmental lawlessness," focusing "pre-eminently on the rural poor" (ibid., 109). Distinguishing the US phenomenon, he describes it as one that represented "interests without groups" (ibid., 109). Others are even more categorical in making this distinction. See, e.g. P. N. Bhagwati, "Judicial Activism and Public Interest Litigation," *Colum. J. Transnat'l L.*, 23 (1984), 561, 569. Bhagwati asserts that: "The substance of public interest litigation in India is much wider than that of public interest litigation in the United States," as while embracing all of the issues encompassed in the US movement, the Indian movement went beyond and focused on "the disadvantaged and other vulnerable concerns" (ibid., 569). He adds to Baxi's categories of "state oppression" and "governmental lawlessness" some additional areas of judicial interventions in India, such as administrative deviance and exploitation of disadvantaged groups and denial of their rights and entitlements (ibid., 569). Both of these writers propound "social action litigation" as a more appropriate term to describe the Indian phenomenon.

[63] Commentators on the Indian public interest litigation phenomenon have identified several methods and techniques developed by the Indian courts in order to bring about a relaxed, less formal, and litigant-friendly approach for facilitating such litigation. More

exponents have argued that the socio-economic and political inequities of their countries preclude the most vulnerable from accessing the courts for seeking justice – a challenge exacerbated by their dependence on unapproachable lawyers, intricate and often forbiddingly complex procedural requirements, the prohibitive expense of standard litigation, and traditional legal and judicial attitudes.[64] The "public interest litigation movement," they maintain, has opened up an entirely new arena for recourse to justice for those unable to pursue legal remedies in the past. It is a fast developing and extensive area of study in South Asia.

This new type of litigation is founded on specific provisions of South Asian constitutions that extend legally invocable protection to a diversity of human rights listed under the category of "Fundamental Rights." The Pakistani Constitution contains a comprehensive list of such rights around which the Pakistani appellate judiciary has incrementally developed a body of jurisprudence which it has regularly extended and staunchly defended, despite periods of military intervention that have posed many serious hurdles to their growth and effective invocation.[65] Several leading Pakistani appellate court judgments underline the

particularly, they point out the enhancement of direct access to the courts and relaxed rules of standing, simplification of procedure to ease the commencement of legal actions, creative adjudication and elaboration of rights, and remedial flexibility. See, e.g. J. Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *American Journal of International Law*, 37(3) (1989), 495. See also G. L. Peiris, "Public Interest Litigation in the Indian Subcontinent: Current Dimensions," *International and Comparative Law Quarterly*, 40(1) (1991), 66. Peiris traces the emergence and discusses the dynamics and impact of the "epistolary jurisdiction," the relegation of the doctrine of *locus standi*, the extenuation of adversarial postulates, the direct judicial involvement in controversial policy issues, the emergence of detailed administrative adjudication, the innovation of mechanisms for fact-finding, the expanded scope of discovery, the growing use of the instrument of issuance of directions to federal and state governments, and the invocation of free legal aid – as remarkable and distinctive features of the Indian public interest litigation movement.

[64] See Chief Justice (Retd.) Nasim Hasan Shah, *Public Interest Litigation as a Means of Social Justice*, PLD 31 (1993) (Pak.). See also Chief Justice (Retd.) Ajmal Mian, *Hardships to Litigants and Miscarriage of Justice caused by Delays in Courts*, PLD 103 (1991) (Pak.); and Justice Asif Saeed Khan Khosa, *High Courts and Expeditious Justice*, PLD 97 (1993) (Pak.).

[65] Ch. I of Pt. II of the Pakistani Constitution lays out a comprehensive list of the fundamental rights made accessible to Pakistani citizens. Art. 3 asserts that the state shall ensure the elimination of all forms of exploitation and the gradual fulfillment of the fundamental principle of "from each according to his ability, to each according to his work." Art. 4 protects the right of individuals to be dealt with in accordance with the law. Art. 8(1) extends further protection to these fundamental rights by declaring any law inconsistent with the same to be void to the extent of such inconsistency. Art. 8(2) prohibits the state from passing any laws that take away or abridge the fundamental

importance of interpreting the Constitution in a manner allowing the ambit of fundamental rights to expand.[66] The development and growth of fundamental rights jurisprudence in Pakistan has largely taken place due to special constitutional provisions for accessing the appellate courts for the protection of such rights. Article 199(1) of the Constitution bestows jurisdiction on the provincial High Courts, on the application of "any aggrieved party" or "on the application of any person," and where "it is satisfied that no other adequate remedy is provided by law," to not only issue the usual writs of prohibition, *mandamus*, *certiorari*, *quo warranto*, and *habeas corpus*, but in addition to "on the application of any aggrieved person, make an order giving such directions to any person or authority including any Government exercising any power or performing any function in, or in relation to any territory within the jurisdiction of that Court as may be appropriate for the enforcement of any of the Fundamental Rights."[67]

Article 184(3) of the Constitution, on the other hand, enshrines the original jurisdiction of the Supreme Court of Pakistan and also grants it *suo motu* powers to intervene in areas of "public importance" for enforcing fundamental rights.[68] The Supreme Court can utilize the same powers as the High Courts in order to issue various writs, or employ

rights and declares that any law made in contravention of this clause would be void to the extent of such contravention. See Pakistan Constitution, Arts. 3, 4, 8–28.

[66] E.g. the Pakistani Supreme Court has held that constitutional interpretation should not just be a ceremonious observance of the rules and usages of interpretation, but ought instead to be inspired by, inter alia, fundamental rights, in order to achieve the goals of democracy, tolerance, equality, and social justice (see *Benazir Bhutto v. Federation of Pakistan*, PLD 416, 489 (1988) (Pak.)); that the prescribed approach while interpreting fundamental rights is one that is dynamic, progressive, and liberal, keeping in view the ideals of the people and socio-economic and politico-cultural values, so as to extend the benefit of the same to the maximum possible number of people; further, that the role of the courts is to expand the scope of fundamental rights and not to extenuate the same (see *Muhammad Nawaz Sharif v. Federation of Pakistan*, PLD 473, 674 (1993) (Pak.)); and that a provision restricting fundamental rights or provincial autonomy ought not to be interpreted liberally, so as to widen its scope. In the context of the imposition of state emergencies, fundamental rights cannot be suspended as a matter of routine and the citizens cannot be deprived of their liberties unless such deprivation is reasonably related to the object of the proclamation of emergency. Further, in doing so, the Executive must bear in mind the object of the proclamation of emergency (see *Sardar Farooq Ahmed Khan Leghari v. Federation of Pakistan*, PLD 57, 307 (1999) (Pak.)).

[67] See Pakistan Constitution, Art. 199(a), (b), and (c).

[68] Art. 184(3) essentially says that the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights is involved, have the power to make an order of the nature mentioned in Art. 199.

Article 187(1) of the Constitution, which allows it the "power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document."[69]

It should, however, be noted that this judicial activism has been far from controversial. Over the years, and especially more recently, it has been open to persistent criticism from a wide range of political and legal commentators in Pakistan – this criticism embraces the full spectrum of arguments that are usually made in support of judicial minimalism.[70] The escalating levels of judicial activism in Pakistan have been critiqued, at times, as a transgression of the appropriate role of unelected judges in a democratic polity. It has been assailed in other cases as being in violation of the "doctrine of political question," and questioned as inappropriate judicial interference in politically contentious and technically complex areas – liable to result in burnt fingers for bungling activist judges, and contributory to the creation of additional hurdles for the elected democratic governments. Less than salutary motivations of personal publicity and facile popularity – galvanized by the rapidly growing, as yet poorly regulated, and at times highly sensationalist Pakistani electronic media – have also been blamed for inspiring some judges to interfere in issues that ought to be left to the political and social arenas. Furthermore, appellate court judges have also been criticized for ignoring their institutional and resource capacity constraints while zealously undertaking *suo motu* cases, which has resulted in less attention to and frequent neglect of their normal, and rapidly accumulating, work in their original and appellate jurisdictions. Additionally, such *suo moto* cases have been blamed for leading certain judges to interfering in matters that ought really to be addressed by improved and empowered district courts, which in turn causes the latter to become even less significant and empowered.[71]

[69] See Pakistan Constitution, Art. 187(1).

[70] See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999).

[71] A recent tussle between the Supreme Court of Pakistan and the Federal Government on appropriate sugar prices in the country, as well as disagreement on whether the court could fix these prices, is a very good example of these growing tensions. At one point in the hearing of this matter, a judge of the Supreme Court took offence when a Government Expert Commission, while explaining to the court the process of determination of commodity prices, criticized an earlier High Court decision to fix sugar prices. The judge scolded the commission for lecturing the court on economics. Although the court

In the American context, conservative commentators sometimes employ the political epithet of "judicial tyranny" in order to criticize certain non-originalist constitutional interpretations of the US Supreme Court.[72] Apprehensions of "judicial tyranny" in the sense of regular and debilitating judicial invasion of democratic decision-making space, and also a lack of its own institutional accountability, are also palpably present in the contemporary Pakistani discourse on the role of the judiciary.[73] Such apprehensions are steadily escalating due to a combination of divergent factors, such as the increasingly activist nature of the Pakistani judiciary, its aforementioned controversial role in military regime legitimization, and its progressively aloof and domineering attitude toward political governments in the aftermath of its eventually triumphant defiance of General Musharraf. In addition, as a consequence of the latter, judges are much more individually and personally visible in Pakistan than elsewhere. The current Chief Justice, Iftikhar Muhammad Chaudhry, was the much-flaunted and highly visible symbol of the recent Pakistani "Lawyers' Movement" and, as a result, the pinnacle of concentrated public and media attention. The circumstances and nature of the

conceded that the matter was in the domain of policy-making and inherently political, it said that it was under compulsion to intervene due to the adverse impact of high prices on the public and the lack of appropriate remedial steps by the government. This is a classic embodiment of the dilemma. Real economic constraints together with government inaction or misgovernance create a crisis that captures the public and then judicial attention. The courts increasingly intervene, often to popular acclaim, but soon realize that the problem is far more complex than it first appeared and is essentially unjusticiable. At times, they start refuting the government's perspective or alternative technical explanations and justifications as attempts to violate their writ and stature. The issue becomes personalized. Often, nothing really comes out of it, except sensational press. See N. Iqbal, "Judge Takes Offence at Commission Report on Sugar," *The Daily Dawn*, October 23, 2009, http://archives.dawn.com/archives/38949. For an account of the Supreme Court of Pakistan's recent controversial jurisprudence in high-profile matters involving complex and conflicting economic perspectives, and advocating greater judicial reticence in such matters, see F. Naqvi, "The Economics of Judicial Interventionism," *The Friday Times*, March 19–25, 2010.

[72] For an interesting analysis of "Interpretivism" and "Neutral Principles," see M. V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harv. L. Rev.*, 96 (1983), 781. Tushnet describes these two concepts as the leading dogmas of modern constitutional theory that are designed to remedy a central problem of liberal theory by constraining the judiciary sufficiently to prevent judicial tyranny.

[73] See, e.g. A. Jamal, "Consistently Inconsistent," *The Friday Times*, March 12–18, 2010; K. Ahmed, "'Independent' or 'Powerful,'" *The Friday Times*, March 12–18, 2010; N. Sethi, "Anti-Status-quo Reform Needed," *The Friday Times*, March 12–18, 2010; and O. Siddique, "A Flawed Debate," *The Friday Times*, March 12–18, 2010.

movement necessitated that he play the role of its figurehead. Although largely communicating through his lawyers, he, and indeed other judges, have at times divulged – and continue to do so in the post Lawyers' Movement era – a penchant for delivering emotional speeches at various bar council meetings and a soft spot for overzealous TV cameramen and hyperbolic court reporters. He was invariably present in the midst of major protests and long marches, which involved many thousands of lawyers and members of civil society. His is the most resonant and recent public image of the hyper-active activist judge. Although necessary and meritorious in its special context, in view of its continuing reverberations, the "Lawyers' Movement" persuades many in Pakistan – given the myriad unresolved problems of the court system faced by them daily, especially in the country's district courts – that it is high time that the judges left the streets, avoided the limelight, and dedicated themselves to upgrading and reforming the courtrooms and their quality of justice.[74] As a corollary, this sentiment also extends to the judicial activism approaches.[75]

Quite apart from these problems of the heightened politicized nature of public interest litigation and the increasing use of *suo moto* powers for the often ill-advised judicial interference in political and policy questions, it is also important to note that even within the narrower paradigm of pro-vulnerable interventions, the judicial activism approaches, like the other approaches discussed in this chapter, essentially focus on delay reduction and greater access to the courts. Quite predictably, they too

[74] See, for instance, O. Siddique, "The Lawyers' Movement and its Fragments," Special Report – *The News on Sunday*, February 19, 2012. See also O. Siddique, "… And Justice for All," *The Express Tribune*, February 16, 2012; "The Language of Justice," *The Express Tribune*, February 28, 2012; "The Agents of Justice," *The Express Tribune*, March 6, 2012; and "Waiting for Justice," *The Express Tribune*, March 27, 2012.

[75] For a very insightful critique of the politicization of public interest litigation and the Supreme Courts' *suo moto* powers, see M. Khan, "The Politics of Public Interest Litigation in Pakistan in the 1990s," *Social Science & Policy Bulletin*, 2(4) (2011), 2. The article explores the political roots of judicial activism in the Constitutional Courts of Pakistan through the development and expansion of the public interest litigation movement in the 1990s, in turn motivated by various political agendas and considerations of the appellate courts. By situating the public interest litigation phenomenon in Pakistan within a comparative framework with India, the author argues that judicial activism in Pakistan was a manifestation of the larger crisis of governance and democratization in the country after the departure of the military government of General Zia-ul-Haq, combined with judge-led creation of novel jurisprudential tools selectively borrowed from India as well as the hierarchical institutional structure of the Supreme Court of Pakistan and the vast discretionary powers of its Chief Justice.

almost never seriously question the fundamental post-colonial edifice, features, and contours of the justice system and its robust linkages with the colonial past, as well as its continuing utility and relevance to contemporary Pakistani society. The activism stems, after all, from judges whose world view is invariably steeped in and careers dependent upon the growth and further expansion of the existing formal justice/court system.

The access to justice as a function of access to economic and political empowerment approaches

Although not exclusively focusing on justice sector reform in Pakistan, some of the ongoing donor-funded developmental capacity-building projects and poverty alleviation programs recognize the important linkages between the low access of vulnerable groups to employment, education, and health facilities, and their weak political participation and access to justice. For instance, the ongoing European Commission (EC) "democratization and human rights" projects in Pakistan also support initiatives that facilitate access to justice for vulnerable groups in society. They particularly highlight the vulnerable status of women, children (especially child labor exploitation and juvenile justice), and religious, ethnic, and tribal minorities, and focus on strengthening viable systems for provision of legal assistance, rights awareness campaigns, and advocacy with the government for legislative reform, as well as compliance with international treaty commitments toward "human rights," "fair globalization," and "decent work." These projects and programs tie in with ongoing EC assistance to help strengthen the democratic process in Pakistan, with a particular emphasis on political parties, public accountability, and the electoral process. One distinctive feature of such projects and programs is that they avoid an exclusive reliance on government institutions, thus acknowledging the important role of NGOs/Non-State Actors/social partners in socio-economic development. Consequently, engaging civil society, building the capacities of elected representatives, raising public demand and pressure for reform, fostering public–private and private–private partnerships at the grassroots level, and exploring alternative ways of resolving disputes are increasingly important components of the EC-Pakistan cooperation portfolio.[76]

[76] See Pakistan-European Community, "Country Strategy Paper for 2007–2013," http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141549.pdf.

Certain ongoing UK Department for International Development (DFID) projects in Pakistan also embrace the philosophy that access to justice is ultimately linked to greater economic and political empowerment of vulnerable groups. The main foci of these projects have been poverty reduction, education, health, inclusive growth, governance reforms, gender reforms, humanitarian work, and making aid more effective.[77] This is in refreshing contrast to the aforementioned justice sector reform approaches, which more or less engage with the justice sector in a vacuum, consider alternative dispute resolution as a side theme, and imagine that the special predicament of the more vulnerable in society can ultimately be tackled through enhanced judicial capacity and efficiency. As opposed to this, the "access to justice approaches" described in the earlier section highlight the larger political, economic, and social challenges confronting Pakistan. Although their overarching focus is not on reforming the legal and justice system per se, they are promising both for their special attention to vulnerable groups and the fact that they make the vital link between access to justice and access to economic/political empowerment.[78]

However, even these approaches have shown a tendency, at times, to falter and succumb to the temptation of providing simplistic legal solutions to complex political and economic problems. For instance, a recent DFID-funded proposal for promoting legal empowerment in Southern Punjab proposed an extensive legal aid program in order to assist poor litigants to overcome their economic constraints to accessing the courts.[79] It proposed "a pilot intervention to support the poor in exercising their legal rights," as it considered that "the challenge is to propose mechanisms that allow the poor to have a level playing field while

[77] In November 2006, the UK and Pakistani governments signed a 10-year Development Partnership Arrangement. The UK Government announced an increase in aid to Pakistan for the period 2009–13 to the tune of £665 million. In July 2008, DFID published its new country plan for Pakistan, which focuses on, inter alia: improving access to better health and education; creating growth and jobs for poor people; making government more effective; and ensuring that the international community works together more effectively. For details of DFID's projects in Pakistan, see www.dfid.gov.uk/Where-we-work/Asia-South/Pakistan/. For DFID's overall plans for 2009–13, see DFID Pakistan, "Operational Plan 2011–2015" (updated June 2012 – the plan will be updated annually), www.dfid.gov.uk/Documents/publications1/op/pakistan-2011.pdf.

[78] USAID Pakistan, "Pakistan Rule of Law Assessment – Final Report" (November 2008), http://pdf.usaid.gov/pdf_docs/PNADO130.pdf.

[79] Crown Agents for DFID, "Legal Empowerment of the Poor – Scoping and Design, Punjab Economic Opportunities Programme (PEOP), Summary Project Document" (2009).

interfacing with the legal system."[80] The highly debatable premise here is that the poorer sections of population in Southern Punjab actually possess some definite invocable legal rights and also viable justiciable claims for which they actually want to access the courts. This hopeful premise is put forward in the absence of any current data or preliminary empirical scrutiny that can clearly demonstrate the actual nature of disputes as well as the prevalent rights framework in Southern Punjab, and that can also further substantiate whether the issues at ground level are amenable to a judicial resolution. Land is generally crucial in the Punjabi context, both as an instrumental asset in the political economy of rural Punjab, and as a significant source of litigation. However, we do know that landholding patterns, the nature of land-based rights and claims of different classes and communities, and consequently the magnitude and nature of any related litigation can vary greatly depending on the particular area of the Punjab. Southern Punjab is the poorest area, with a distinctive landholding pattern generally characterized by a dominant landed political elite and a large population of landless tenants. The particular land distribution regime in parts of Southern Punjab, and the various rights in and dependencies on the same, are the outcome of the canal-colonization-based social transformation in this and other areas under British rule – discussed in Chapter 3. However, seemingly oblivious of this important historical and socio-economic context, DFID's project proposal conveniently assumes the existence of certain rights that can be agitated in courts.

Furthermore, even if certain justiciable rights of the poor actually exist vis-à-vis land – which they may as easily not in the current land law regime – the proposal overlooks the risk that merely extending legal aid to the poor may not necessarily equip them to fight traditionally long and exhausting court battles against potentially much more resourceful adversaries, especially in a litigation system that is highly susceptible to delaying tactics and political pressure. In other words, even if it were to proceed with the enthusiastic assumption that the proposed legal aid mechanism effectively evades corruption, institutional inertia, official red tape, seepages, and elite capture, and actually manages to fund the potential legal agitation of some poor would-be litigants, there is simply no assurance that these newly funded litigants would not simply end up joining an already very long queue of existing litigants who have been

[80] "Legal Empowerment of the Poor."

awaiting final court verdicts for many years, even decades. Equally, there is no assurance that they would manage to outlast their legal adversaries, who are likely to be battle hardy veterans of many legal contestations.

DFID's project proposal, which I use here as an example typifying a particular sub-strain of such reform approaches, rather perfunctorily probes whether these claimants may actually prefer other local, less expensive, and easily accessible dispute resolution mechanisms. At the same time, it does not even attempt any preliminary review whatsoever of the underlying legal, political, and economic arrangements causing the actual disempowerment of the poor in Southern Punjab. A proclivity for offering facile solutions – devoid of any empirical and sociological understanding of context – to complex issues of economic, political, and consequent legal disempowerment, can also, therefore, jeopardize the meaningfulness of some of these approaches.[81]

A uniform ethos: different avatars?

A fundamental premise and underlying expectation of all of the justice sector reform approaches discussed above is that a more efficient formal legal/court system can successfully meet all the expectations and aspirations of diverse contesting social groups in society – even one as skewed in terms of economic, political, and social empowerment as the Pakistani milieu. Legal pluralists in comparatively much more equitable contexts point out that such fetishization of the formal legal/court system as a monopoly over all coercion is misconceived; that it can turn the formal legal system into a leviathan, which further precludes the desirability of the wholehearted pursuit of such an exclusivist model. They point out the potentially huge gulf between what they describe as popular legal consciousness and people's actual experience with the formal legal process.[82] The chasm, as discussed above, is much wider in contexts

[81] In another recent engagement on a potential project to assess the post-conflict legal needs of Pakistan's tribal areas, an international expert working for a UN agency expressed the hope that the project would be able to extend special focus to engendering the legal bars in these areas. Even a cursory examination of Pakistani newspapers would divulge that these are some of the most backward areas in the region in terms of female literacy, and that the Taliban have been regularly bombing schools for girls. The quixotic endeavor of finding a legal bar in these areas, let alone one with female lawyers awaiting assistance for empowerment, is highly naive to say the least.

[82] See S. E. Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-class Americans* (University of Chicago Press, 1990).

like Pakistan. While pursuing the utopia of an efficient, all-encompassing, full-fledged formal legal/court system that is expected to fully correspond with the divergent normative structures and disparate expectations of various sections of society, most of these reform approaches show little patience for alternative informal dispute resolution possibilities, social regulation, deep and meaningful legislation, political and social action for change, and radically new arrangements in terms of the underlying basic laws/rules of society. Indeed, some even regard any consideration of the same to be tantamount to an undesirable and resigned admission of failure of the larger project of an efficient formal legal/court system. Some of the aforementioned approaches, with non-existent or weak democratic credentials, have also, while using legal tools, controversially attempted (and continue to attempt) to ignore, overrule, and forcibly change the existing normative structures of society – such as Zia's "Islamization" attempts and certain strains of ongoing judicial activism. Theirs are more the crimes of actual commission as compared to the several acts of omission of the other law reform endeavors in Pakistan.

Furthermore, the overemphasis on "delay" in most of these reform approaches is fraught with problems. This obsession has caused the reformers to lose sight of other equally important dimensions of a well-functioning formal dispute resolution system. Quite apart from the actual equity and distributive justice of underlying laws, the quality of legal judgments is also a function of the availability of sufficient time, training, resources, support, and technical assistance in order for the judges to get to the crux of complex matters with multiple facets and ramifications. The penchant for delay reduction erroneously overestimates the ability and capacity on the part of the judges to ensure, in much tighter time frames, to give fair hearings to all parties, and provide sustainable, longer-term solutions to complex and recurring issues. Ultimately, a very important facet of the adjudication of legal disputes is one that highlights the people, classes, and groups in society who continue to win and those who continue to lose. Or, in other words, the dimension that looks at how a legal system entrenches or revisits the underlying legal rules of the game that impact and determine the distribution of economic resources and political power in society. These important considerations, questions, and points of deeper inquiry have, however, been largely lost sight of in the single-minded pursuit of swift justice. Even at the rudimentary level of enhancing systemic "efficiency," these approaches and the collective Pakistani legal reform experience are flawed and indeed unsuccessful at various levels.

A quick comparative examination of the Indian legal and judicial reform experience is beneficial. Upendra Baxi for one describes the post-colonial law reform endeavors in India as deeply flawed for the following reasons. Their impulse has come "almost wholly, from the governing elites" rather than from the public, thus making them "technocratic and non-participative."[83] Such law reform has not fundamentally re-examined the legal system and its real crisis, but has been "ad hoc" and "patchwork," rather than being "contemplative," "sustained," and "systematic."[84] As a result, law reform efforts in India have lacked a comprehensive grasp of social reality and a "coherent philosophical, ideological base," thus leading to a situation where there is "no adequate institutionalization of law reform, no systematic agenda for it," and hence no integration of effort or optimal use of "available talent, skills and personnel."[85] Therefore, according to Baxi, "such a situation is one where one may legitimately speak of the crisis of law reform."[86] This description is also uncannily reminiscent of the law reform phenomenon in Pakistan. While the officially adopted stance on reform has been showcased as grand and all-encompassing, its methodology, to use Baxi's terms, has been essentially "action-oriented, instrumental, patchwork."[87] At times, "reform" has been a mere "ritual" to meet immediate and urgent political demands to dissipate outward manifestations of deeper crises. At other times, it has simply been the slogan for governmental attempts at displaying an outward commitment to positive change, rather than a well-thought-out ideology and process.

Post-colonial inertia and the poverty of imagination

From the colonial to the post-colonial era: elements of continuity and its custodians

As is evident from the previous sections, some of the most prominent legal and judicial reform debates in Pakistan claim to be addressing its various crises while looking to international best practices, but with insufficient attention to local context, realities, and aspirations. Their

[83] U. Baxi, *The Crisis of the Indian Legal System* (New Delhi: Vikas Publishing House, 1982), p. 245.
[84] Baxi, *The Crisis of the Indian Legal System*, p. 245.
[85] Baxi, *The Crisis of the Indian Legal System*, p. 245.
[86] Baxi, *The Crisis of the Indian Legal System*, p. 245.
[87] Baxi, *The Crisis of the Indian Legal System*, p. 245.

essential focus is on whittling and tweaking the edifice of the existing system, institutions, and processes for better service delivery. Furthermore, much as this system, its institutions, and their processes are largely inherited from Pakistan's colonial past, these debates are undertaken without a backward glance, a look at the past, or any sense of history. Thus, the evaluations, critiques, and proposed reforms of the Pakistani legal/judicial system emanating from its "legal community" have consistently fallen far short of any deeper sociological, historical, institutional, and structural assessment of the legal status quo in terms of its differential impact on and disparate benefits to different sections of society.

In this context, it is important to further evaluate the role of the Pakistani 'legal community' – I use this term to describe judges, lawyers, court staff, government policy-makers, and law officials, as well as local and international policy reform consultants – in entrenching and perpetuating the legal and judicial system inherited from Pakistan's colonial past. It is not at all coincidental that this system revolves around, is exclusively controlled and run by, and provides sustenance to career judges, the professional legal bars, and the various other aforementioned members of this "legal community." The role played by the lawyers in particular is a paradoxical one, having acted as they otherwise have as prominent champions of pro-independence and pro-democracy movements during the colonial and post-colonial eras. The maintenance of a legal/judicial status quo by the "legal community" may be understood, I propose, in three different ways. First, judges and lawyers worldwide are, by and large, instinctively conservative due to the very nature of their vocations, which put a premium on solidity, certainty, predictability, and invariability. They are institutionally protective of the existing legal and judicial systems and generally hostile to any ideas of deep and destabilizing law reform or to the transfer of certain kinds of disputes to alternative modes and mechanisms of dispute resolution. Their motivations may be both ideological and professional. They can have great faith and pride in what they do and hence may feel rightly justified in having a monopoly over dispute resolution and dispensation of justice. They may also entertain considerable skepticism (at times well grounded) about the efficiency, quality, independence, and impartiality of any alternatives to the formal legal system. The motivation can also be economic or financial. Alternatives to the formal legal system or any great simplification thereof can translate into lost revenues in client fees. Thus, for certain members of the "legal community" – especially the lawyers practicing in overpopulated lower courts where competition is

fierce, revenues lean, and survival tenuous – reforms that can lead to the erosion of existing lacunae, complexities, and contradictions in the laws/legal system may be perceived as potentially detrimental to the overwhelming existing public reliance on legal advice and the rich earning streams generated from the same.

Second, the resistance to legal/judicial reform can also stem from a ubiquitous institutional inertia and resistance to any change as such – as change could mean substantial financial, political, institutional, and emotional costs of having to adjust and modify existing well-rehearsed practices and convenient ways of doing things. Finally, for certain sections of lawyers, and indeed court staff and even judges – generally, but by no means exclusively, on the lower rungs of the legal, administrative, and judicial hierarchy – any reforms that address lacunae, complexities, and contradictions in the legal/judicial system, as well as delays in legal process, can dilute "rent-seeking" opportunities. Their pro-status quo stance can and indeed does manifest in resistance and hostility to not just reforms that make the legal system simpler, transparent, and more intelligible to the layperson, but particularly to reforms that promote ideas of and mechanisms for greater professional accountability of lawyers and judges.

All of these motivations are as true for the Pakistani "legal community" as they may be for legal communities elsewhere. However, it must be noted that the Pakistani legal community's support for the status quo does not begrudge an expansion in the size and reach of the formal legal system. In the introduction to this book, I elaborated on the fact that the barriers to entering the legal bars in Pakistan are very few, and that they are deeply divided along ideological, political party, and sometimes ethnic and caste lines. The factors that galvanize a tighter regulation of the size and quality of legal bars elsewhere are largely absent in the Pakistani context. Various law reform commissions/committees and indeed the National Judicial Policy 2009 have actually recommended that the panacea for the ills of the legal/judicial system lies in increasing the number of judges and court staff, enhancing their incentive structures, and boosting their judicial budgets. At the same time, the membership of the various legal bars is rapidly inflating. So maintenance of the status quo in the Pakistani context actually involves the steady expansion of the formal legal/court system – with certain sections of the "legal community" strongly resistant to any major changes in the laws and legal system. "More of the same" is apparently the solution of choice for the Pakistani legal community.

The fact that the lawyers also control the domain of legal education in Pakistan poses many additional issues. Among other things, this has meant that the particular bent and emphasis of legal education in Pakistan has been to impart a craft-like specialization. It may be useful here to briefly examine Max Weber's typology of professional legal training and the various legal modes of thinking. In my view, the prevalent manner of legal training in Pakistan can be seen as somewhat similar to, in Weber's terms, an "empirical training in the law as a craft; the apprentices learn from the practitioners more or less in the course of actual legal practice." Weber's alternative type of legal training, on the other hand, takes place through "special schools, where the emphasis is placed on legal theory and 'science,' that is, where legal phenomena are given rational and systemic treatment."[88] In the Pakistani legal academy – which is more or less devoid of full-time academics engaged in research and writing – practicing lawyers predominantly determine academic curricula, set standards, and conduct the actual teaching. This makes the overall scenario not very different in effect from Weber's first "type," where law is taught by the lawyers, and taught as a "craft" rather than a "science." As a matter of fact, if one explores Weber's typology further, certain additional similarities of ethos and methodology emerge. In both situations, the lawyer has displaced the law professor. For instance, Weber characterizes his first "type" as denoting a philosophy of legal training that was purely "empirical" and "practical," and that led to "specialization."[89] According to Weber:

> [T]his kind of legal training naturally produced a formalistic treatment of the law, bound by precedent and analogies drawn from precedent. Not only was systematic and comprehensive treatment of the whole body of the law prevented by the craft like specialization of the lawyers, but legal practice did not aim at all at a rational system but rather a practically useful scheme of contracts and actions, oriented towards the interests of clients in typically recurrent situations.[90]

The clearly vocational orientation of most of the lawyers teaching law, their emphasis on the practical at the cost of the theoretical and abstract, the absence of research-based interdisciplinary, comparative, or critical thinking, and the treatment of given doctrine as gospel are some of the

[88] See M. Weber, "Law in Economy and Society" in M. Rheinstein, (ed.), *Law in Modern History* (Cambridge, MA: Harvard University Press, 1954) (hereinafter, *Max Weber on Law*), p. 198.
[89] *Max Weber on Law*, p. 201. [90] *Max Weber on Law*, p. 201.

prominent drawbacks of current law teaching in Pakistan.[91] It is tempting to quote once again from Weber, who goes on to observe:

> [W]herever legal education has been in the hands of practitioners, especially attorneys, who have made admission to practice a guild monopoly, an economic factor, namely, their pecuniary interest, brings to bear a strong influence upon the process not only of stabilizing the official law and of adapting it to changing needs in an exclusively empirical way but also of preventing its rationalization through legislation or legal science.[92]

The Pakistani lawyers' stranglehold on the country's legal education system promotes and sustains an invasion of law schools by a guild-like mechanical approach to training in law. In many ways, it is symptomatic of the very same ethos that is embedded in the various approaches to justice sector reform in Pakistan, in which the "legal community" has played a very prominent part. As a result, the existing structure, framework, and salient features of the legal/judicial system are seldom questioned at more fundamental levels and in necessary deeper ways.

False starts and aborted idealism: India's failed romance with a new ethos

Have the other children of the South Asian post-colonial birthing fared better? It is instructive to take a look at India, where its post-colonial legal system has come under some strong criticism in recent scholarship. Some close observers of the progress – or rather "regress" as they describe it – of India's post-colonial legal system find it plagued with such a multiplicity of failings that they label it as a "pathology" of a legal system.[93] They point out rampant and deep-seated issues of extraordinary delays, expensive legal proceedings, and a multiplicity of court actions arising out of a single issue. They further identify haphazard execution decrees, various issues with the competence and ethics of the legal bar, problems of dishonesty and lack of probity pertaining to witnesses and judges, and the frequent inability of the Indian courts to bring about a final resolution to resilient litigation.[94] Against the backdrop of this stern indictment of the Indian legal and judicial system,

[91] See Siddique, "Martial Laws and Lawyers."
[92] See *Max Weber on Law*, pp. 202–3.
[93] O. Mendelsohn, "The Pathology of the Indian Legal System," *Modern Asian Studies*, 15(4) (1981), 823–63.
[94] Mendelsohn, "Pathology of the Indian Legal System," 823–63.

highly notable and long-time commentators on the Indian legal scene, such as Marc Galanter, have methodically traced historical attempts in India to revert, at least partially, to indigenous solutions and dispute resolution mechanisms. However, as in Pakistan, these attempts toward any fundamental change in the Indian legal system, or in the organization of its professional legal services, seem to have found little or no support among the Indian lawyer community.[95] Galanter documents a robust debate on the suitability and acceptability of the colonial legal heritage and the need for large-scale reform in the early years after India's independence. A radical reformative spirit, it seems, did linger in the air for a short while. However, it eventually faded away, with the traditional system either "displaced" or "powerfully influenced," or in many cases, "entirely supplanted" by the official system.[96] Galanter finds contemporary Indian attempts to revive this debate to be "contained" by an official system comprising "laws, techniques, institutions and roles" that were, as he says, "with few exceptions, modifications of British or other western models."[97]

Taking forward this analysis, a review of the early post-independence legal reform debate in India reveals arguments propounding the unsuitability of the colonial legal system for the Indian people. These arguments highlight its foreignness, complexity, and propensity for delay. They also point out the wastefulness of its divisive litigation process and tendency toward perjury and corruption. They lament the exacerbation of disputes due to the erosion of traditional Indian consensual dispute resolution mechanisms.[98] Such condemnation was "familiar," according to Galanter, by the mid nineteenth century. It was further fuelled in the first quarter of the twentieth century by the Indian nationalist

[95] M. Galanter, "Introduction: The Study of the Indian Legal Profession," *Law and Society Review*, 3 (1969), 201.

[96] M. Galanter, "The Aborted Restoration of 'Indigenous' Law in India," *Comparative Studies in Society and History*, 14 (1972), 53, 54.

[97] Galanter, "Aborted Restoration."

[98] Significant in this context are Mohandas Karamchand Gandhi's deeply critical assessments of what he perceives to be the self-serving role of lawyers and the consequent problems created for ordinary people trying to resolve their disputes. He also blames the lawyers for stirring communal quarrels between Hindus and Muslims. Gandhi uses the device of an imaginary dialogue between a reader and an editor in order to convey this. See "The Condition of India: Lawyers" in Indian Home Rule or Hind Swaraj (Ahmedabad: Navajivan Publishing House, 1938), pp. 41–42. According to Gandhi's fictitious character of the editor: "The chief thing, however, to be remembered is that without lawyers courts could not have been established or conducted and without the latter the English could not rule."

movement.[99] However, the Constitution of independent India endorsed the inherited legal system. The only concession extended to the Gandhians at the forefront of the demand for resorting to traditional village-based *panchayat* style justice was a Directive Principle in the new Constitution in favor of the *panchayats* as units of local self-government.[100] Voices of dissent persisted, but could not muster any support in the Indian lawyer community for a return to tradition. The lawyers, invariably, viewed Anglo-Indian law as a most beneficial and acceptable outcome.

An Indian Law Commission in 1958 actually declared that the Indian legal system possessed all of the essential features of any system of judicial administration, and was the logical and reasonable culmination of how the indigenous legal system would itself have evolved if allowed to grow "normally." The said Law Commission was also of the view that the traditional system would have been unable to cope with the complex demands of a modern welfare state.[101] As a result, only a limited experimental policy of reviving elected administrative *panchayats* as instruments of village self-government was pursued. This eventually brought about the phenomenon of judicial *panchayats* for specified categories of petty cases for "resolving the alienation of the villager from the legal system."[102] However, lawyers were almost uniformly barred from appearing before them.[103] These judicial *panchayats* were also different from traditional *panchayats* in terms of their constitution, functioning, conformity with statutory law, and dependence on official courts for the execution of their decrees (which could also be challenged in the official courts). What is significant is the disdain and hostility extended to these *panchayats* by the Indian bench and bar, the curbs put on their powers, and the increasingly popular impression that they were by and large merely the downward channels for dissemination of official policy.[104]

Galanter ascribes this marginalization of the *panchayat* reform to the entrenched vested interests of the powerful class of Indian lawyers and their ancillary workers. Their clout was significant, especially as compared to the absence of an equivalent group of stakeholders, interested parties, and spokespersons for the *panchayat* initiative. Galanter further

[99] See Galanter, "Aborted Restoration," p. 54.
[100] Galanter, "Aborted Restoration of 'Indigenous' Law," p. 55.
[101] Galanter, "Aborted Restoration," p. 57.
[102] Galanter, "Aborted Restoration," p. 58.
[103] Galanter, "Aborted Restoration," p. 58.
[104] Galanter, "Aborted Restoration," p. 60.

attributes the dwindling fortunes of any possible revival of a traditional system to the absence of a "vivid alternative" in either religious or customary law to the inherited formal legal system – an alternative that could lay claim to effectively taking on complex modern challenges while upholding the proclaimed national ideals of "secularism," "equality," "unity," "intelligibility," and "free movement and interchange."[105] He also highlights the lack of a "concrete grievance that could mobilize popular support" for the revivalist cause.[106] Finally, Galanter points to the domestication of the Anglo-Indian law at the operative/programmatic level. He is persuaded by the view that a two-way adaptation of law and society had taken place in India through a century-and-a-half of legal pruning, in order to make the law adaptable to local conditions. As a result, he proclaims that Indian lawyers are now the bearers of an all-India culture of working in and with this system – a system that is now intelligible at a national level.[107] Even villagers, according to him, were not as isolated from this system and found ways to selectively use both the formal legal system and the traditional system to their advantage – the latter itself modified by the colonial encounter, due not to any normative superiority, but to its technical, organizational, and ideological characteristics.[108] To Galanter, therefore, the lines of criticism that the current Indian law is not historically rooted in society and thus not "normal," that it is incongruent with its social and cultural setting, and that it lacks an "integrated purposive character" are in part the "working myth of modern legal systems."[109]

The debate on whether the extant legal systems of post-colonial societies are "normal" is a complex one. Galanter's incisive concluding views on the matter notwithstanding, what is of immediate interest are his several important observations about the reasons why the debate on the revival of a traditional legal system actually floundered in India in the 1960s – although he also points to signs of a revival of this debate in the 1990s. In many ways, the reasons he offers are equally relevant to Pakistan, with the qualification that as compared to India, such a debate was near absent even in the early, heady post-independence years in Pakistan. Newspapers from the time reveal that there was considerable popular debate, but importantly, there is little evidence of any serious

[105] Galanter, "Aborted Restoration," p. 61.
[106] Galanter, "Aborted Restoration," pp. 61–2.
[107] Galanter, "Aborted Restoration," pp. 63–4.
[108] Galanter, "Aborted Restoration," p. 64.
[109] Galanter, "Aborted Restoration," p. 66.

discourse at the legislative or policy levels. While mere romantic nostalgia was never going to be a workable alternative for a domesticated local substitute with strong advocates and nationwide familiarity, that still does not quite explain why more nuanced and locally contextualized alternatives and adaptations were not deliberated, especially once it became apparent that the Anglo-Indian system was fast turning into a highly problematic and uncontrollable behemoth. While unsubstantiated representations of the past may have sounded like unworkable myths, how satisfactory was the incumbent system? And yet, fundamental questions remained unasked about the capacity of the existing system to reform itself, even if one were to discard any revivalist notions of the past as quixotic.

Crossing back over to India, where there was admittedly greater debate in the early years after independence, the news on the eventual outcome of its legal reforms is not very heartening. Upendra Baxi, for instance, says that law reform in India has followed the "colonial model of reactive mobilization of the law," rather than proactive mobilization on part of state agencies to protect those who cannot protect themselves. He finds this unacceptable in a context where the "vulnerable" groups are in no position to activate any redistributive legislation on their own, either through agrarian reforms or via social protection legislation. Refusing to accept resource constraints as a valid excuse, Baxi is of the view that the real underlying issue is that law making and implementation in India continue not to be looked upon as a social value and vital component of human and social development.[110]

Despite India's cooling infatuation with any radical revival of tradition, and the lukewarm commitment and defective design of its reform approach, some models of innovation drawn from tradition were introduced and are still being pursued. Scholars who over the decades have kept a close eye on the unfolding of Indian experimentation with the new style *panchayat* system for providing greater public access, participation, and democratic decentralization report a complex set of mixed blessings and outcomes. These range from, inter alia, a further strengthening of patronage and coercive politics, to growing political sensibility and rights awareness among villagers, resulting in some changes in patterns of domination. The less than happy outcome of these changes is attributed to the diversity, incompatibility, and

[110] See Baxi, *Crisis of the Indian Legal System*, p. 47.

ambiguity characterizing the rationale behind this experimentation, as well as structural issues and institutional weaknesses.[111]

According to Baxi, the lack of clarity as to whether these institutions were to act as the lowest rung of the state or as local sub-governmental systems very much impaired their progress. It also encroached upon and displaced community-based dispute resolution institutions.[112] We are also told of how the diverse community-based dispute resolution mechanisms in India have even otherwise suffered at the hands of elite derision, trivialization, and abandonment: popular justice has been and still is deemed to be below the professionalized technocratic model of a "modern, secular, and rational" legal system.[113] Paradoxically, at other levels of the Indian discourse, the themes of multiplicity and plurality of legal systems were rediscovered under a more favorable light.[114] Yet the need to "harness the creative judicial energies of the people towards tasks of dispute handling and conflict processing" remains an outstanding opportunity which, if ignored, as these commentators warn, would ensure "a permanent crisis of the Indian legal system."[115]

Recent ground-level evidence suggests that the *panchayat* innovation has become largely moribund. Villagers are opting for the extremes of informal village forums or formal external tribunals. This has been attributed as much to the procedural rigidity of the *panchayats* as to the opportunities or devices for bargaining and mediation provided by litigation.[116] The Indian public's persistent dissatisfaction with the cost and slowness of India's lower courts – under what the government proclaims to be an indigenized colonial legal system – now also extends to state forays into other dispute resolution mechanisms, such as local mediation alternatives like the *lok adalats*.[117] The emergence of rival courts and dispute resolution mechanisms in various parts of the country – such

[111] U. Baxi and M. Galanter, "Panchayat Justice: An Indian Experiment in Legal Access" in M. Cappelletti and B. Garth (eds.), *Access to Justice: Emerging Issues and Perspectives* (Milan: Guiffre; Alphen aan den Rijn: Sijthoff and Noordhoff, 1979), Vol. III.

[112] See Baxi, *Crisis of the Indian Legal System*, p. 325.

[113] Baxi, *Crisis of the Indian Legal System*, p. 328.

[114] Baxi, *Crisis of the Indian Legal System*, p. 330.

[115] Baxi, *Crisis of the Indian Legal System*, p. 347.

[116] C. S. Meschievitz and M. Galanter, "In Search of Nyaya Panchayats: The Politics of a Moribund Institution" in R. L. Abel (ed.), *The Politics of Informal Justice* (New York: Academic Press, 1982), Vol. 2.

[117] M. Galanter and J. K. Krishnan, "Debased Informalism: Lok Adalats and Legal Rights in Modern India" in E. G. Jensen and T. C. Heller (eds.), *Beyond Common Knowledge: Emprical Approaches to the Rule of Law* (Stanford University Press, 2003); See also

as those run by political groups, both revolutionary and part of the state establishment, local strongmen, and caste *panchayats* – is cited as additional testimony for growing popular dissatisfaction with state experimentations with informalism.[118] This is quite apart from the reportedly growing apartheid-like impression in the popular mind that the "higher courts with the full panoply of legal process" are to serve the powerful, whereas the *lok adalats* are the only flawed recourse offered to the less advantaged – a lackluster and ineffectual poor man's version of the justice system.[119] These narratives on the experience of Indian law reform provide important insights into the perpetuation of an inherited legal system. Although flawed and unsatisfactory, it survives both due to the existence of strong stakeholders and the absence of meaningful alternatives. The indigenous legal community, as it emerges, is the dominant player in this scheme of things. Any serious reform endeavor in post-colonial polities has to remain fully cognizant of their redoubtable challenge.

The centrality of "law" in contemporary "law and development" discourse: a poor substitute for questions political and economic?

Loath as they would to be described in this manner, while firmly controlling the discourse and process of legal/judicial reform in their countries, the "legal communities" in India and Pakistan seem to be a major part of the overall problem. This ascendency and primacy of lawyers and judges in post-colonial societies in the context of municipal law reform is not a unique phenomenon. A parallel development in the international law and development sphere is the growing importance of "law" – not just as the mode and medium of discourse, but also as a possible panacea for the myriad political and economic issues debilitating developing countries. This has two obvious ramifications in the municipal context. First, the growing elevation of the status of law in the international law and development discourse is bound to additionally entrench and enhance the role of lawyers/legal practitioners in the rather monotonous

M. Galanter and J. K. Krishnan, "'Bread for the Poor': Access to Justice and the Rights of the Needy in India," *Hastings L. J.*, 55 (2004), 789.

[118] Galanter and Krishnan, "Debased Informalism."

[119] Galanter and Krishnan, "Debased Informalism."

municipal deliberations over the best paths to legal and judicial reform nirvanas. This can further marginalize alternative visions that focus on underlying issues of equity and distribution. A necessarily interdisciplinary approach that is required for a better appraisal and more meaningful resolution of crumbling legal and judicial systems thus faces the very real prospect of legal euthanasia. Instead of economics, history, sociology, anthropology, and political economy joining forces with law, we may be moving toward the dogma of a disciplinary monotheism. Second, the role of the international financial institutions (IFIs) in "assisting" developing countries with reforming their legal/judicial systems is likely to be even further strengthened. I have already examined in some detail the various design constraints, ideological biases, and market-economy-centric perspectives of major international donor-funded ROL programs. The fundamentally disturbing question at hand is to what extent will alternative visions and voices for reform, as well as the priorities and stakes of the "vulnerable" and the disadvantaged, fall even further by the way side?.

The most poignant exposition of some of these apprehensions has come recently from David Kennedy. He views this new canonization of law – and the multiple expectations from it to define development, as the route to development, and as the framework and vocabulary for debating development, which convert the legal regime into the site for "contestation and experimentation" – as highly problematic.[120] The choice of law at the expense of political deliberation and dialogue and rigorous economic analysis ignores the distributional choices brought about by different legal regimes and rules. According to Kennedy, it is the choices in terms of distribution that really ought to determine the choice of the developmental path, and also its social, political, and economic aspects. Using "Rule of Law" not just as an arena for contestation, but also as a substitute for debating difficult political and economic questions through ideological and theoretical engagement, and thereby turning them into questions of technocratic expertise, is a fallacy. The far less than satisfactory outcome is the growing articulation of development as simply "economic growth plus." This in essence means following the "best practices" of efficient economies, and worrying about the more contested

[120] D. W. Kennedy, "Laws and Developments" in A. Perry and J. Hatchard (eds.), *Contemplating Complexity: Law and Development in the 21st Century* (London: Cavendish Publishing, 2003).

and complicated distribution issues later.[121] However, procrastination on these issues not only aggravates them – it can also ensure that their day may never really come.

In significant ways, Kennedy's observations and apprehensions about the growing monopoly of the legal discipline in the international law and development discourse hold great relevance for the domestic context of law reform in Pakistan. The policy goals articulated in the most prevalent law reform approaches in Pakistan are now increasingly dictated by "best practices" put forward by international bilateral and multilateral donors. Such IFI-dictated "ROL" programs have come under fire in the new generation critiques in international law and development. According to these critiques, these programs, inter alia, have a tendency to further constrain state autonomy and political choice. Furthermore, in such ROL programs, "market actors" are promoted as an important source of demand for "good law"; there is only comparatively superficial recognition of non-legal sources of normativity; and the IFIs increasingly use human rights jargon as a reformulated vision of development, so that while there is active endorsement of such jargon, there is actually little or no real promotion and consolidation of such rights, or merely a "selective engagement" with the same.[122] Such "selective engagement" can ultimately translate into existing "contract" and "property" rights receiving a much greater fillip at the expense of a meaningful rights discourse that brings about structural changes to address societal inequities. Most tellingly, critics point out that despite the change in jargon, the actual content of the international legal reform agenda has changed very little over the years. Its main concerns remain the efficiency of and competition within the system – while the main themes vis-à-vis the reformation of the state remain corruption, transparency, and accountability.[123]

[121] D. W. Kennedy, "'The Rule of Law,' Political Choices, and Development Common Sense" in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge University Press, 2008).

[122] K. Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in Trubek and Santos, *New Law and Economic Development*. The World Bank, in particular, has come under criticism for its resistance to both empirical evidence and academic critique in its continuation of policies that focus on the promotion of a legal order consisting of predictable, enforceable, and efficient rules required for a market economy to flourish. See A. Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in Trubek and Santos, *New Law and Economic Development*.

[123] See Rittich, "Future of Law and Development."

While the core of the international reform agenda is still about "efficiency," an important related issue of course is that of the 'one size fits all' nature of many IFI reform prescriptions, and thereby the absence of vitally needed pluralism. In what has been described as the "post-developmentalist," "post-structuralist," and "post-fundamentalist" current "moment" of the law and development dialectics, scholars recognize the several unvanquished perils of such an approach. These include, inter alia, ethnocentricity, neglect of context, and the discounting of difference, with an over-emphasis on judicialism and "Rule of Law."[124] The dominant mantra of "Rule of Law," in turn, has been described as the result of the confluence of two different projects: the "project of democracy" (domestic human rights protection); and the "project of markets" (discovery of institutions). Yet both projects look to "Rule of Law" for, and require from it, constitutional guarantees for some rights, even if they disagree on which rights. Similarly, both projects aim for an independent judiciary, even if they disagree on its role. Both projects further seek cost-effective access to justice, but disagree on what it means. Finally, both projects have faith in

[124] S. Newton, "The Dialectics of Law and Development" in Trubek and Santos, *New Law and Economic Development*. The discipline of "law and development" has been recognized as the meeting point of three different disciplinary fields, i.e. dominant economic theories, prevailing legal theories, and institutional practices and policies of development agencies. The dominant economic theory in the current phase of "law and development" has been described as the need for state intervention to address market failures. See J. Stiglitz, "The Post Washington Consensus" in N. Serra and J. E. Stiglitz (eds.), *The Washington Consensus Reconsidered: Towards a New Global Governance* (New York: Oxford University Press, 2008). On the other hand, the dominant current "legal theory" has been described as "the unsynthesized coexistence of transformed elements of CLT" (classical legal thought) and "transformed elements of the social" – with "CLT" and the "Social" being the two earlier modes of global legal consciousness in Duncan Kennedy's seminal scholarly categorization and description of the different stages and characteristics of the globalization of law. See D. Kennedy, "Three Globalizations of Law and Legal Thought: 1850–2000" in Trubek and Santos, *New Law and Economic Development*, p. 63. According to Kennedy, this "contemporary legal consciousness harbors a plethora of normative reconstruction projects, designed to transcend the opposition of the CLT and the Social and thereby restore Reason to rulership in law"; and also a "plethora of methodologies through which legal theorists attempt to achieve a distanced understanding of the relation of law to other domains" (p. 71). Finally, the dominant contemporary institutional practice has been described in terms of the rising investment by IFIs in law reform instead of market institutions. See D. Trubek and A. Santos, "The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in Trubek and Santos, *New Law and Economic Development*.

modernized neo-formalism. Thus, together they constitute an uneasy amalgam of potentially contradictory strands with many tensions, and some overlap. According to David Trubek, the inherent earlier tensions between, for instance: "Formalism" (a neutral framework for growth, judicial autonomy, and adherence to rule of law) and "Pragmatism" (the need for an instrumental approach to law, pragmatic problem solving, and policy science); "Economic Constitutionalism" and "Democratic Empowerment"; market-oriented growth and direct poverty alleviation; efficiency and distribution; and globalization and endogenous growth continue to characterize the modern international "law and development" debates.[125]

Given these conflicting strains and dichotomous directions, it is disturbing to observe that the various recurrent issues, contradictions, and blind spots of current IFI-funded ROL projects that have been highlighted in recent critiques very much permeate the dominant efficiency plus approaches to justice sector reform that hold sway in Pakistan. At the same time, the various cautions and warnings about the relentless dominant agenda of the ROL juggernaut seem to have been repeatedly ignored by those at the helm of the reform dialogue in Pakistan. These cautions highlight that "no one size fits all," and that earlier attempts at transplants and top-down reforms have not worked. They reiterate the merit of context-specific development. They reemphasize the importance of long-term horizons for reform. They underline the need for much greater focus on labor, women, and environmental rights, and not just on contract, property, and economic regulation. They exhort the desirability of special efforts to ensure real access to justice. They remind us once again that there are many different legitimate paths to growth. They question formalism and rigid constitutional constraints on state action. They warn against the constant risk of the elite capture of reforms. Very importantly, they draw attention once again to the existence of a gap between "law in books" and "law in practice."[126] As already discussed in this chapter and as discussed in much greater detail in Chapters 5 and 6, these warnings remain largely unheeded. At the same time, it is becoming increasingly apparent that the domestic voices in support of the "project of democracy" are growing increasingly muffled in the din and clamor of the IFI-funded pursuit of the "project of markets."

[125] See Trubek and Santos, "Third Moment."
[126] Trubek and Santos, "Third Moment."

Conclusions

Two self-constraining and debilitating features characterize the justice sector reform discourse in Pakistan. First, a robust debate, analysis, and critique of the underlying political and economic arrangements in society (especially requisite in a post-colonial context) – which directly impact resource distribution, rights generation and protection, empowerment, and access to economic, political, and social opportunities – have been and continue to be largely missing from its political and legislative discourses. Thus, the vital linkages and interdependencies between formal legal rights and the necessary economic and political conditions required for their actualization have been consistently ignored. This crisis of Pakistani politics and its democratic development has caused its politicians and legislators to relinquish the discourse on justice to its lawyers and judges, enabling the latter to dominate and control it.

In other words, Pakistan's discourse on justice has been largely formulated and structured by the parochial and technocratic perspectives, agendas, and aspirations of the Pakistani "legal community," which is unwilling to revisit the fundamentals of the legal and judicial system. Thus, the current definers and controllers of the justice sector reform agenda in Pakistan are by and large incapable of, unsuitable for, and disinterested in any deeper substantive reforms in the legal/judicial system. As a result, this discourse is largely superficial and process-focused rather than engaged with substantive issues of justice; it is about foreground institutions rather than background norms; and, therefore, it is inherently socially and politically de-contextualized. Although similar in many ways, such domination of the reform discourse by the "legal community" is much more pronounced in Pakistan as compared to India.

Second, even within the narrower and technocratic domain of the extant Pakistani justice sector reform discourse, the predominant themes for reform have been the enhancement of "access to courts," "judicial efficiency," and "speed of justice." These obsessions, as I have extensively argued, have caused the neglect of various other important performance aspects of the formal legal system, such as the quality of legal judgments. They have also precluded possibilities, even within the limits and constraints of the judicial function, of rigorous analysis and possible reform of the structural and societal constraints that hamper citizen access to courts. Finally, they have shrunk the already limited possibility horizon

for the judges and courts, as ultimately, disempowerment and inequity are perpetuated by the persistence of fundamental underlying political and economic realities, the holistic and sustainable correction of which is beyond the capacity of the courts – to tackle recurring discord and disputes in society and to promote greater distributional justice, fairness, and equity through judicial interpretations of extant laws. These much more challenging goals apart, even the more limited goals defined by the exclusive reform pursuits of "efficiency" and "speed" have not been met. For instance, in the more limited paradigm of legal case disposal by the courts, the gap between the increasing case burdens on the courts and their speed of disposal is an ever-widening one. The fate of reforms for the enhancement of "access" to courts has been the same, as the gap between possible access and the actual access of disputants who cannot afford the time, funds, and energy to seek such access is also an ever-widening one.

An additional problem in this context is the growing popularity of legal rhetoric in the international law and development discourse. This is bringing about a new reductionism wherein complex development issues are increasingly formulated, evaluated, and debated through the framework of legal concepts and remedies. This increasing dominance of law and legal rights as the mode and medium of discourse in international law and development literature, together with their deification as a possible panacea for the myriad political and economic issues debilitating developing countries, is further contributing to the congestion of necessary political and social space for meaningful evaluation of the problems of disempowerment and discord in post-colonial societies.

In this context, the massive donor-funded justice sector reform projects introduced in Pakistan over the last decade or so have hijacked the opportunity and space for a deeper, multi-disciplinary, and essentially political and economic debate. Such a desirable debate has been replaced instead by a narrowly circumscribed legalistic discourse that assumes, takes for granted, and further consolidates the existing underpinnings and ethos of the Pakistani economic and political system. Meanwhile, "property rights protection," "contract enforcement," and the pursuit of a model of free market economy remain the predominant highlights of such IFI-funded projects. Meanwhile, the deeper and more divisive issues of disempowerment remain neglected. As a result, the extant Pakistani legal and court system largely ends up being, and is popularly perceived as, a formal, justificatory, and legitimizing façade

for the less than just and inequitable underlying economic and political arrangements in Pakistani society. The following two chapters will evaluate in greater detail Pakistan's experience with international donor-led justice sector reform over the last decade-and-a-half – an extraordinary period due to the extent of unprecedented international donor involvement, as well as the scale of financial injections for justice sector reform.

5

Reform on paper: a post-mortem of justice sector reform in Pakistan 1998–2010

Justice sector reform 1998–2010: a post-mortem

The focus in this chapter shifts to how the recent Pakistani justice sector reform discourse and interventions have responded to the various challenges discussed in previous chapters. This chapter closely evaluates the nature and impact of the predominant types of government and donor-driven justice sector reforms in Pakistan from 1998 to date. While examining this period of intense and expensive reform activity, it primarily assesses the Asian Development Bank's (ADB) $350 million "Access to Justice Program" (AJP). Through this assessment, it aims to present a nuanced understanding of the current state of play in the Pakistani justice sector, strongly molded and impacted as it is by the successes and failures of the preceding decade.

The AJP merits exclusive emphasis for several reasons. AJP was, in various ways, very vast and ambitious in scope – although also very narrow in other ways as we shall see, complex and extensive in operation, and it remains to date the largest externally funded justice sector reform program in the world. It dominated the Pakistani reform landscape for an entire decade and left an indelible imprint on local reform thinking and implementation. Compared to AJP, many of the other donor-driven reform programs in Pakistan during this period were comparatively insignificant in terms of their scope and financial outlay. In addition, they did not offer anything by way of content or methodology that was not already part of AJP's thematic coverage, reform menu, and implementation strategies. Hence, they were predominantly subsumed by or dovetailed with AJP's reform interventions. Therefore, it can be safely said that an exhaustive evaluation of the impact of AJP is largely synonymous with an impact assessment of the overall reform interventions during this period.

The fundamental aspiration of the AJP and other donor-driven reform projects in Pakistan over the past decade or so was to achieve "delay reduction in courts." It is important to outline the ways in which this

aspiration is problematic. At the outset, it needs to be mentioned that a whole host of factors can create excessive workloads for the courts, and thus cause delays in litigation. As demonstrated by the Lahore Survey results, one cannot overlook, for instance, the complexity, ambiguity, and delay-creating potential of various aspects of court processes, procedures, mechanisms, and systems. Neither can one ignore the generally accelerating levels of litigiousness in a society, which in turn may be the outcome of various different factors, such as, inter alia, growth in population, rural–urban migration patterns, other large demographic displacements leading to disputes and contestations, the breakdown of normative frameworks in society, and the increasing unavailability of alternative modes of dispute resolution. In addition, the abuse of the legal process by litigators and lawyers in order to create delays and thereby gain greater negotiating leverage is also a well-known phenomenon – one that was also on display in the Lahore Survey results. Equally evident in those results were the multifarious, entrenched, and convoluted natures of the underlying disputes in legal cases, which also have a strong bearing on the life span of litigation. Many of the respondents in the Lahore Survey also reported that outdated or flawed laws and regulations create greater potential and propensity for recurrent disputes and excessive litigation. Factors such as the suboptimal performance of the police, other law enforcement agencies, and various government departments and agencies – which were analyzed in the context of the Crime Survey discussed in Chapter 3 – also have a direct effect on the speed and outcome of litigation. In addition, the level and stringency of application of various bars to litigation, such as *locus standi*, jurisdiction, pre-trial disclosure requirements, and requisite conditions for appeals, etc. directly control the volume of the case flow in courts. Other significant factors include the competence, integrity, neutrality, and attitudes of judges, the overall quality of performance of the courts of first instance, the extent of political interference in legal cases and judicial matters, judicial incentives and career structures, and training and performance-enhancement programs for judges. Thus, delay can be the manifestation or outcome of several related and underlying problems.

In other words, "delay reduction" in courts cannot be simply achieved through an exclusive focus on the "efficiency" enhancement of court processes and systems. Neither can the larger concept of justice sector reform be reduced to the much narrower area of court reform. However, the AJP and other donor-driven reform programs of the past decade opted to overemphasize the fairly narrow paradigm of "delays" and "case

backlogs." Within this paradigm, court delays were visualized primarily as a function of the courts' capacity (both human and infrastructure) and their administrative and management systems. Ten years and $350 million later, one must seriously question whether, inter alia, a moderate enhancement of the judiciary's budget, a modest increase in the number of judges, and sporadic improvement in the physical infrastructure of the court system were really worth all the trouble and expense. One must also ask whether delays in court were the only or even the most crucial problems facing the Pakistani litigant public. Finally, one also has to wonder whether the obsessive focus on delay reduction in courts ended up pushing aside the opportunities for attending to the multiple additional problems of the justice system discussed in previous chapters. Did a monomania with speed lead to a fatal ignorance of the need for, as well as have an adverse effect on, the actual quality and fairness of judicial output?[1] This chapter sets out to describe and discuss what precisely transpired over the past decade of Pakistan's justice sector reform experience in order to attempt to answer these important questions.

Research methodologies: many voices, different narratives

The mapping and assessment of the official Pakistani justice sector reform discourse and processes is a highly challenging task. Because they are largely restricted to closed-door deliberations of the judicial leadership, relevant government departments, and international bilateral and multilateral donor agencies, they are mostly inaudible to the general public, as well as the specialized researcher/commentator. They are not shared with and discussed in the various political and public discussion forums in any great detail, apart from periodic official summarized reports on certain reform interventions, and a rather one-sided appraisal of the same. There are no feedback loops to speak of; they are neither covered by popular or specialized media, nor evaluated with any consistent interest or rigor in the local and international academy. Therefore, they have to be visualized and delineated – almost imagined and given form – through a tedious process of unearthing and following the documentary trails of previous and current reform projects. These are not publicly available documents: they have to be excavated and coaxed out of various government departments and donor

[1] "Quality" is arguably a vague term when one speaks of judicial output. It is used here to collectively refer to all that a legal dispute resolution system is looked upon to deliver, in addition to "speed" or "efficiency."

agency offices in order to be assembled into any coherent shape for examination. Relevant and reliable data on the reform interventions and their impact are even rarer commodities. Paucity and inaccessibility of information were thus major obstacles to giving form and shape to the nature, mechanics, and outcomes of the reform discourse and interventions over the past decade. The data used for analysis in this chapter was painstakingly pieced together from various sources, and consolidated and cross-checked for reliability.

The narrative that follows relies on six distinct "voices" that were captured through multiple research methodologies, which also aided in identifying significant areas of convergence and divergence in what these voices had to say. The section entitled "AJP's 'avowal' to be different" and certain portions of "Evaluating ADB's evaluation of AJP" convey the "official voice" of ADB on how reform was visualized and implemented, and also its actual impact or lack thereof. This is the nameless voice that emerges from AJP's documentation, reports, policy actions, and formal reform evaluations. It tells the official story of the AJP-dominated decade of reform. The section entitled "Taxonomy of AJP reforms" follows on from the previous section to provide the taxonomy of AJP reforms in terms of the overall ambit and focus of this massive reform project. "Reform on paper – evaluating AJP's outcomes" and "Evaluation findings," on the other hand, contain the "interpretative and analytical voice" of the author. It relies on the official documents discussed in "AJP's 'avowal' to be different," as well as additional relevant official and unofficial documents and data. Engaged in an interpretive and evaluative exercise, it bases its analysis on credible textual and statistical evidence. Audible at times here is also a third voice – which by definition is subjective. Although also the voice of the author, this is the "voice of personal experience." It communicates the author's personal and direct insights as a policy consultant in many of the reform projects undertaken in the past decade. These insights are valuable due to their closeness of observation (such proximity being unavailable to the distant onlooker), and also due to the aforementioned paucity of publicly available information.

The section entitled "Evaluating ADB's evaluation of AJP" then undertakes an evaluation of ADB's own "official" evaluation of AJP, thus combining the "official voice" and "interpretative and analytical voice." "Reform with democratic deficit – critiques from a comparative perspective" captures another unofficial voice. This is the "comparative review voice" that emerges from the sparsely available secondary literature. It gauges the design and impact of AJP in comparison with other past and present international

justice sector reform endeavors. Thus, it provides an additional useful evaluative parameter for judging the AJP. The "Reform without context – a critique from without" section reproduces a voice that critically appraises AJP from "outside" the actual operation of this project, while being very familiar with its overall political and societal contexts. This is the "informed outsiders' voice" that emanates from the multiple perspectives and diverse disciplinary expertise of well-known Pakistani experts in the areas of, inter alia, political science, political economy, public policy, journalism, and constitutional law. These "informed outsiders" have had no direct engagement, and were not in any way professionally and/or financially associated, with the AJP or other reform projects. However, they are keen observers of and commentators on the decade of donor-driven reform in Pakistan. "Reform without structure — a critique from within", on the other hand, captures a very different "unofficial voice" – the "insiders' voice" of those who were directly and closely involved with the donor-driven reform projects of the past decade. This voice conveys the views and perspectives of actual reform designers, reform program officers, and local policy consultants who were centrally involved in the actual reform process. This is a particularly interesting voice; at times, it attempts to veil and at others it openly shares critical information on how reform was actually visualized and implemented. The latter is particularly insightful given that various aspects of the reform process remain entirely hidden from the public gaze. It is also fascinating to see how the "insider" positions range from those of the apologist, the supportive, and the persuasively justificatory, to those who are implicitly or openly critical.

The final section provides some overall conclusions based on the above analysis.

In terms of overall methodology, this chapter is informed by and based on over fifty detailed interviews with independent experts and key commentators; reform consultants and donor organization officers; and government officials, district court judges, lawyers, and court administrative staff. Additionally, it relies on a close review of available official-reform-related documentation and reports, statistical analysis of available and excavated official and unofficial data, and secondary materials and publications.

AJP's "avowal" to be different

At the very outset, it is important to determine how ADB formally and officially visualized and defined the design and objectives of AJP. The officially stated long-term objective of the program was to reduce poverty

and improve governance through improved rule of law (ROL).[2] According to ADB, AJP's desired overall outcome was to improve access to justice in order to: (i) provide security and ensure equal protection of the law to all citizens, especially the poor; (ii) secure and sustain entitlements and reduce the poor's vulnerabilities; (iii) strengthen the legitimacy of state institutions; and (iv) create conditions that were conducive to pro-poor growth.[3]

AJP's statement of purpose and its intended outcomes were admittedly promisingly vast and ambitious, especially so when compared with earlier reform approaches that have been critiqued for having a very narrow court focus and a limited menu of prescriptions.[4] What is particularly noteworthy in AJP's statement of purpose is the recognition of the significant link between poverty and lack of access to justice, and a concomitant commitment to undertake reform that empowers the poor. Although AJP's mission statement was prima facie broad and dynamic, the devil, as they say, is in the detail. The following sections provide additional perspectives on AJP's actual design, implementation, and impact. They explore whether AJP fulfilled its promise to bring about pro-poor reform. They also determine whether AJP possessed the features and ingredients that have been identified elsewhere as key to effective reform, including: an incremental approach to reform; extensive engagement with the legislature and the executive; and the generation of a high level of sustained donor commitment to, as well as domestic support for, the proposed reform.[5]

Taxonomy of AJP reforms

AJP laid down sixty-four policy actions in order to attain its desired reforms. These policy actions were meant to achieve twelve "broad outcomes," six each in the judicial and police sectors. These "broad outcomes" were further broken up into twenty-five specific "outcome areas," which

[2] ROL was the most commonly used term by various donor programs during 1998–2010.

[3] "Program Completion Report: Access to Justice Program" (Pakistan) (Loans 1897-PAK, 1898-PAK, and 1899-PAK) (ADB, December 29, 2009), p. 1 (hereinafter, ADB, "Program Completion Report").

[4] See E. Jensen, "The Rule of Law and Judicial Reform" in E. Jensen and T. Heller (eds.), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford University Press, 2003).

[5] Jensen, "Rule of Law."

delineated the intended reforms with greater precision.[6] The following is a classification of these specific "outcome areas" according to the broad arena of operation – as identified by the author – in which they were meant to have an impact.

Judicial and court reforms

(1) amend the Law Commission Ordinance of 1984 in order to improve the administration of justice;
(2) formalize a National Judicial Policy Making Body acceptable to the Chief Justice;
(3) declare a policy to examine the laws governing tribunals and special courts in order to ensure consistency with the established principles of justice;
(4) ensure that the adjudicatory powers of the executive magistrates are transferred to the judiciary;
(5) increase judicial budgets and introduce modern budgeting methodology;
(6) support alternative dispute resolution for caseload reduction;
(7) establish Small Causes Courts;
(8) enact amendments to the Family Courts Act in order to expedite the resolution of family disputes;
(9) improve internal governance of judicial institutions;
(10) enhance judicial appointments in the district courts;
(11) separate the civil and criminal courts; and
(12) reduce delay.

Police reforms

(1) amend the police law in order to establish public safety commissions and complaint authorities and to enhance functional specialization;
(2) improve police performance through costed and time-bound plans;
(3) announce human rights and gender sensitization policies for the police; and

[6] The six broad "judicial outcomes" were: (i) better policy making; (ii) stronger judicial independence; (iii) greater efficiency; (iv) legal empowerment of the poor and vulnerable; (v) better judicial governance; and (vi) human resource development. The six broad "police outcomes" were: (i) insulation of the police from interference; (ii) improved capacity; (iii) establishment of an independent prosecution service; (iv) greater police accountability and transparency; (v) better liaison between the police and citizens; and (vi) public awareness and protection of rights.

(4) establish citizen–police liaison committees.

Legislative and procedural reforms

(1) introduce suitable changes to the legal process;
(2) enact and bring into force new laws for freedom of information, contempt, and defamation; and
(3) introduce consumer legislation.

Administrative law reforms

(1) strengthen the administrative grievance redress mechanisms; and
(2) re-examine the immunity of public servants and establish legal and institutional frameworks to hold public servants accountable and liable for any omissions and commissions.

Other institutional reform

(1) strengthen the enforcement of environmental law; and
(2) establish an independent prosecution service.

Legal empowerment

(1) generate legal literacy and empowerment; and
(2) promote and reform legal education.

It is evident from the above taxonomy that roughly half of AJP's specific "outcome areas" – which I have classified as "judicial and court reforms" – essentially focus on various aspects of court administration. In this broader category, we have the "outcome areas" that pertain to judicial administration, policy-making, organization and ambit of powers, court restructuring and creation of new courts, judicial budgets, governance, appointments, and capacity building, court delay, and caseload reductions, and also an "outcome area" dealing with the development of court-assisted alternative dispute resolution. In addition to these, some of the "outcome areas" focus on the qualitative performance and efficiency enhancement of the police as well as general public servant accountability. A few "outcome areas" visualize some procedural and substantive law reforms. Some others focus on additional institutional reforms – although these too largely interplay with the formal court system. Ultimately, only two "outcome areas" focus on the end-users of the justice system and their challenges, under the rubric of "legal empowerment." Thus, contrary to AJP's avowed focus on societal variables such as poverty, the balance of its reform menu was very much tilted in favor

of generic judicial administrative capacity-building and court-based efficiency enhancement reforms.

This chapter will exclusively examine the AJP "outcome areas" that were directed primarily at the judiciary and the courts. This is due to the fact that not only were most of the funds for reform allocated to the same, but as is evident from the taxonomy, these were AJP's most significant areas of emphasis. AJP's performance in these key areas can thus provide a fairly accurate idea of the extent of its overall success. Additionally, this chapter will also examine AJP's performance in the two "outcome areas" for "legal empowerment," in order to gauge how it fared with regard to its avowed mission to robustly address the disempowerments and vulnerabilities of Pakistani citizens. The chapter heavily relies on insights provided by a recently conducted extensive evaluation of all twenty-five AJP "outcome areas," of which the present writer was a co-author.[7]

Reform on paper: evaluating AJP's outcomes

The overall evaluation reveals that certain commonalities of ethos, design, structure, approach, and implementation strategy characterize all of the reform interventions that shall be discussed in detail below, and indeed also the rest of the twenty-five AJP "outcome areas." In terms of the structure of the ensuing evaluation, I first reproduce the title of the "outcome area" and a description of the policy action(s) stipulated under that "outcome area." This is followed by ADB's own evaluation of the level of governmental compliance with the "policy action(s)," thus denoting its assessment of their level of effectiveness and success. Then comes a critical evaluation to gauge whether a "policy action" was meaningfully and appropriately formulated to achieve the goals of the stated "outcome" area; the actual level and seriousness of governmental compliance with the "policy action"; the impediments faced in terms of implementation; and the ultimate impact of the reform intervention toward achieving the goal(s) of the "outcome area."[8]

[7] For a detailed analysis of AJP's design, implementation strategy, and impact, as well as a critical review of AJP's interventions in all twenty-five "outcome areas," see S. A. Murtaza and O. Siddique, *The Retrospective Report: Mapping and Assessment of Justice Sector Interventions – Donors and Government, 1998–2010* (Islamabad: The Asia Foundation, 2010).

[8] The language of the "outcome areas," "policy actions," "level of GoP compliance," and status under AJP and post-AJP has been drawn from the 2009 ADB "Program Completion Report" of the AJP (cited above, fn. 3).

> Introduce amendments to the Law Commission Ordinance of 1984, to improve the administration of justice.

ADB reports "full compliance" with this policy action.[9]

As part of AJP's larger menu for judiciary and court-related reforms, this policy action aimed at broadening the mandate and membership of the Law Commission of Pakistan – a federal government institution with multiple research, advisory, and recommendatory functions pertaining to law reform and legal empowerment – in order to ostensibly regularize and galvanize rigorous indigenous deliberations over reform.[10] The renamed Law & Justice Commission of Pakistan's (LJCP) membership was extended to include the Chief Justice of the Federal Shariat Court, the four provincial chief justices, the Attorney General of Pakistan, the Secretary of the Ministry of Law, Justice and Human Rights, Chairman

[9] ADB, "Program Completion Report," p. 48.

[10] The aim was pursued through issuing an amendment to the Law Commission Ordinance in 2002, whereby the name of the Commission was changed to Law & Justice Commission of Pakistan (LJCP). The earlier Law Commission of Pakistan had ten members who were appointed by the federal government on the recommendations of the Chief Justice, in addition to the Chief Justice as the Chairman as well as the Secretary, Ministry of Law (MoL). See Law Commission Ordinance of Pakistan, 1979 (Ordinance XIV of 1979). The Commission is entrusted with several functions (abbreviated here by the author with some language changes):

(i) regular and systematic review of the statutes and other laws for improvement and modernization according to the changing needs of society;
(ii) codification and unification of laws to eliminate multiplicity of laws on the same subjects;
(iii) removal of inconsistencies between federal and provincial laws;
(iv) simplification of laws for easy comprehension; proposals for raising societal legal consciousness;
(v) reforms in the administration of justice; adoption of simple and effective procedures for administration of laws to ensure substantial, inexpensive, and speedy justice;
(vi) improvements in the quality/standard of legal education;
(vii) development of human resources for efficient court administration and management of case flow; coordination between the judiciary and executive authorities of the federal government and provincial governments on administrative, financial, and other related matters;
(viii) preparation and operation of schemes for access to justice, legal aid, and human rights protection;
(x) management of the Access to Justice Development Fund; and
(xi) opinion and advice to federal government or any provincial government, when sought, on any matter relevant to its functions.

See the LJCP website at www.ljcp.gov.pk/1.htm for the specific delineation of these functions.

of the Commission on the Status of Women, and four additional members who were to be appointed by the federal government upon the recommendations of the Chairman of the Commission, i.e. the Chief Justice of Pakistan.[11] The members to be appointed by the federal government were essentially required to have judicial, legal, or administrative experience.[12]

As can clearly be seen, the revitalized LJCP's membership criteria ruled out any wider and deeper representation from society. The aforementioned control of the Pakistani reform discourse by the "legal community" can be seen as crystallizing in the fact that LJCP's members were mandated to be exclusively drawn from judges (both serving and retired), lawyers, and bureaucrats – with the exception of just one member representing a state-run commission on women. Although the criteria allow the appointment of an academic, to date that has not happened. The four additional members actually appointed by the federal government on the recommendation of the Chief Justice are two retired judges and two lawyers.[13] Although respected professionals, their close ideological and political affinity with the current judicial leadership due to their prominent role in the "Lawyers' Movement" seems to be the primary basis for their selection. The LJCP's membership structure crystallizes the "closed door" approach to the official reform discourse in the country – a discourse formally restricted to select judges and lawyers. Apart from the membership, the operational arrangements of the LJCP also do not lay out any mechanisms for wider representation, engagement, and consultation. As to the actual potential for regular and meaningful operation of LJCP as currently constituted, it is worth noting that all of its current members are very busy individuals with additional (mostly official) responsibilities or private legal practice imperatives. As a result, in terms of their prioritization of activities that demand time and effort, LJCP consistently takes the back seat. Meetings are rare. Other significant stakeholders in the reform discourse are invariably excluded as they are almost never invited to or consulted regarding LJCP deliberations. As a result, LJCP deliberations are necessarily restricted to a narrow and technical engagement that emanates from status-quo views on legal and judicial reform. They are also characterized by a highly

[11] See Law & Justice Commission of Pakistan Ordinance No. LXX of 2002.
[12] LJCP Ordinance, § 3(2).
[13] For the current membership of the LJCP, see www.ljcp.gov.pk/Menu%20Items/Members/members/index.html.

formal and hierarchical structure – explicit in its membership – which precludes divergent opinions, insights, priorities, experiences, as well as open criticism and free exchange of views.[14]

LJCP has been legally endowed with a wide ambit of functions that embraces, inter alia, regular review of the laws for possible reform, unification, simplification, and rationalization; as well as additional responsibilities to bring about improvements in the administration of justice and legal education; and also introduction of innovations for enhancing access to justice and protecting human rights. There is wide recognition, however, that since its restructuring, LJCP has hardly adduced any meaningful output or initiative in any of these areas – and that it essentially functions as the Chief Justice's extended secretariat.[15]

An independent and autonomous law commission with a diverse membership, a fine-tuned ambit, clearer prioritization of goals, concrete powers, and reliable mechanisms for performance accountability by the larger public through greater transparency of operation and regular dissemination of output could have conceivably played a significant role in boosting and coordinating a wide-ranging and productive reform discourse in the country. As visualized and augmented by AJP, however, what we have ended up with is yet another top-heavy, bureaucratic, and largely paper-pushing entity that is more or less inconsequential in the national democratic and rights debates. So while the policy action has been fully complied with on paper, what has resulted is a veritable non-entity.

> Formalize a National Judicial Policy Making Body acceptable to the Chief Justice.

[14] See Murtaza and Siddique, *Retrospective Report*.

[15] The formal reporting by the LJCP of its activities and output itself bears testimony to this. A sketchy list of titles is provided under the heads of the "Access to Justice Development Fund," "Public Awareness Programs," "Law Reforms," "Publications," and "Media Releases." These reveal neither the process of deliberation nor details of content, quite apart from the reported activities and outputs lacking logical sequence or prioritization. Several personal engagements with Dr. Faqir Hussain, Secretary LJCP, and various visits to the LJCP over the years reveal that it has very low operational autonomy as well as weak institutional capacity for any regular and meaningful discussion of legal and judicial reform. It is also more or less opaque to the outside world in terms of its operations and is not accessible unless by formal invitation. Thus, it has no independent plan of action and activities except for those that are sporadically directed by the Chief Justice. Although also tasked to look into legal education reform, to date, the LJCP has not come up with any concrete thinking or meaningful steps in this area either. See www.ljcp.gov.pk/ for details of activities reported by the LJCP.

ADB reports "full compliance" with this policy action.[16]

The deliberations on the nature and ambit of the eventual AJP policy conditionality matrix that preceded AJP's formal launch recommended the establishment of an autonomous National Judicial Policy Making Authority (NJPMA). The underlying idea was for such a body to spearhead a rigorous and regular judicial policy dialogue and more effective judicial administration. This supra body was expected to support the judicial leadership in the overall tasks of judicial administration and policy-making, the coordination of the provincial courts, and the management of existing court and case systems.[17] These specific recommendations were, however, not included in the eventual AJP policy conditionalities. Instead, AJP decided to seek judicial cooperation and consent for its reform package by calling for the establishment of a judicial policy-making body that was "acceptable to the Chief Justice." This effectively reduced national judicial policy-making to a much narrower exercise within the sole domain of the judicial leadership of the country, to the exclusion of other important players. The current structure of NJPMA embodies this eventual understanding as it exclusively comprises serving senior judges and is headed by the Chief Justice of the Supreme Court.[18] This is despite the fact that the Pakistani court system has significant administrative links and interfaces with the executive branch, and also various spheres of administrative interdependence with the same – as is the case, for instance, in the United Kingdom, Canada, and France. However, the NJPMA not only precludes the executive from the process of judicial policy-making at the

[16] See "ADB Program Completion Report," p. 48. The report further states that NJPMC is fully functional and recently adopted the National Judicial Policy 2009 (ibid.).

[17] See *Pakistan Legal and Judicial Reform Project, ADB, Integrated Report* (The Asia Foundation, September 1999), p. 42.

[18] Chief Justice of Pakistan is the Chairman of the NJPMA and the Chief Justice, Federal Shariat Court and Chief Justices of the four Provincial High Courts are its members. The Secretary LJCP is designated as the Secretary to the NJPMA. NJPMA's delineated functions are as follows: (i) improving the capacity and performance of the administration of justice; (ii) setting performance standards for judicial officers and persons associated with performance of judicial and quasi-judicial functions; (iii) improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and (iv) publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts and courts subordinate to High Courts, and Administrative Courts and Tribunals. NJPMA is required to publish an annual report of its activities and such other periodic or special reports relating to its functioning, as it deems fit. The reports are submitted to the President of Pakistan.

See www.ljcp.gov.pk/Menu%20Items/NJPMC/introduction/introdution%20of%20njpmc.pdf.

national forum specially set up for this purpose, but also any additional stakeholders.[19] This evidences AJP's acceptance of a very court-centric view of the justice system.

In 2009, the NJPMA devised a National Judicial Policy (NJP). I have mentioned earlier in this book that despite its otherwise broad rhetoric for change, the NJP has a narrow paradigm and a disappointingly limited reform framework. The NJP's less than innovative aspirations, its conservative visualization of reform while firmly subscribing to existing judicial arrangements and world view, and its overwhelming emphasis on "speed" and "efficiency" at the expense of various additional structural, institutional, and substantive issues confronting the Pakistani justice sector are the logical outcomes of NJPMA's narrow and homogenous membership structure. NJPMA was never designed to rock the boat, and quite predictably it has not.

> Declare a policy to examine the laws in relation to Tribunals and Special Courts to ensure their functioning is consistent with the established principles of justice.

ADB reports "full compliance" with this policy action.[20]

Special administrative tribunals and courts in Pakistan deal with both regulatory and non-regulatory offences. Over the years, these tribunals and courts were established to provide speedy and effective judicial determinations in areas of law involving issues that required more expeditious resolution than others.[21] This was done in view of the grinding and highly time-consuming processes in the ordinary courts. The idea was

[19] See A. Ashworth and M. Redmayne, *The Criminal Process* (Oxford University Press, 2010) for an elaboration of the judicial policy-making function in other common and civil law jurisdictions that display close interface between the judiciary and the executive. The text makes the argument that judicial systems need to closely liaise with non-court actors in view of their crucial role in the justice system, as highlighted, for instance, by case diversion methods and non-court-based ways of dispute resolution (ibid.). The fact that NJPMA is exclusively populated by judges has precluded serious consideration and pursuit of not just ADR and court mediation alternatives, but also any serious consideration of any reform possibilities that fall outside the current thinking and analytical framework of the country's judicial leadership.

[20] See ADB, "Program Completion Report," p. 48.

[21] These include, inter alia, the following courts and tribunals: Accountability Courts; Banking Courts; Special Courts for Banking Offences; Services Tribunals; Income Tax Tribunals; Anti Corruption Courts; Anti Narcotics Courts; Anti Terrorist Courts; Labor Relations Courts; Board of Revenue; Special Magistrate Courts; Consumer Courts; Juvenile Courts; Family Courts; Drug Courts; Special Courts for Emigration Offences; Court of Special Judge (Customs); Income Tax Appellate Tribunal; Revenue Courts; and Rent Courts.

also to separate from the mainstream the adjudication of disputes in areas that required special training background and expertise on the part of the adjudicators. AJP, however, sided with the judicial leadership's stance against the possibility of executive appointment of specialists to such tribunals/courts. AJP agreed with the judicial leadership's world view – which could be critiqued at least in part as being motivated by the imperatives of turf management – which equated such, at times highly necessary and desirable, appointments with a dilution of and a trespass into the judicial powers of administering the country's ordinary court system.

There is credence to the criticism that this court-centric view contradicts the internationally recognized domain of political choice in the establishment of separate and special adjudicative mechanisms for effective responses to evolving societal needs and economic imperatives. AJP's policy action awarded the judicial leadership *carte blanche* to review such arrangements under the amorphous and misplaced rubric of "established principles of justice" – the interpretation of what was "established" left solely within the purview of the judicial hierarchy. Thus, what was clearly situated within the larger realms of the political and public policy was instead confined to rather unclear and potentially mechanical doctrinal scrutiny by the courts.[22]

> Ensure that the Adjudicatory Powers of Executive Magistrates are transferred to Judiciary.

ADB reports "full compliance" with this policy action.[23]

This policy action stems from the same court-centric view of the justice system described above. In 1996, the Government of Pakistan took away the adjudicatory powers of magistrates appointed by the executive in the realm of private law, and conferred them on the judiciary. However, the adjudication of social regulation violations remained vested with executive magistrates. After coming to power, General Pervez Musharraf's government embarked on a reform program toward the decentralization of government. In principle, this was a commendable step to bring governance closer to the people, but it was hastily and arbitrarily envisioned and implemented – primarily motivated as it was by the desire of the military regime to create a new and controllable power "constituency," below the elected parliaments that were populated

[22] See Murtaza and Siddique, *Retrospective Report*.
[23] See ADB, "Program Completion Report," p. 49.

by political party representatives. The Musharraf Government also undertook steps to otherwise dilute the civil bureaucracy's ambit of operation, which it sloganeered as one of the main impediments to progress – divulging an old rivalry and power struggle between military regimes and the civil bureaucracy.[24] The Musharraf Government took the view – which was shared by the judicial leadership of the time – that the continued vesting of certain adjudicatory powers with the district magistrates was in violation of Article 175 of the Constitution.[25] This is despite the fact that at the time when AJP was launched, no express judicial verdict declared such vesting of powers to be unconstitutional. Thus, whether or not vesting certain adjudicative powers with executive magistrates promoted more effective social regulation and greater public good was essentially a political question and inherently a policy decision.[26]

However, AJP visualized and formulated it as a purely legal issue and arguably once again infiltrated the domain of the political by lending its full-fledged support to bring about the demise of the district-magistracy-oriented view of governance reform. This was done without any consultation with relevant political, governmental, and societal actors and stakeholders. Thus, it revealed a rather Diceyan view of constitutional law and judicial independence on part of the AJP.[27] It can be persuasively argued that this step actually further impaired access to justice due to the increased caseloads for the courts, feebler enforcement

[24] Interview with Syed Ali Murtaza, Senior Civil Servant, Justice Sector Reform Advisor and Former Program Officer AJP, May 11, 2010. See also Murtaza and Siddique, *Retrospective Report*.

[25] Art. 175 of the Constitution pertains to the establishment and jurisdiction of courts.

[26] See Murtaza and Siddique, *Retrospective Report*.

[27] Some commentators are of the view that the AJP simply took up the idea as it was *en vogue* with the military government of the time, which wanted the abolition of the executive magistracy so that it could reconfigure Pakistan's political and governance structure to suit its ends. Furthermore, it also helped AJP administrators forge better links with the judicial leadership of the time, which was in accord with the abolitionist intent of the Musharraf Government, motivated as it was by its long-standing opposition to the idea of executive magistracy holding any adjudicative powers, as the executive magistracy lay outside its ambit of control. Regardless of such motivations, they insist that whether or not the executive magistrates should have adjudicative powers ought to be determined in view of the merits and demerits of the choice in terms of public utility and welfare, rather than by institutional rivalries or doctrinal interpretations. See interviews with Mr. Zubair Bhatti, Former Executive Magistrate and Former Provincial Program Officer, Sindh, AJP, May 2010; and Mr. Kamran Ali Afzal, Senior Civil Servant, Lahore, May 2010.

of social regulations, and consequent weakening of public entitlements.[28] It is a good example of AJP's exaltation of the courts as the preferred domain of all dispute resolution, at the expense of the possible alternatives of tighter regulatory frameworks, more effective social regulation, and additional avenues for adjudication of disputes. AJP's approach can be criticized as being informed by a narrow legalistic perspective as well as the political exigencies of the time, rather than a deeper appreciation of the particularities and specific needs of the litigating public.

> Increased provision of budgets and introduction of modern budgeting methodology for judicial budgets.

AJP had five policy actions geared toward more effective budgeting and the provision of additional funding for the judiciary. Two of these policy actions called for the introduction and implementation of medium-term budgetary frameworks (MTBFs) for the judiciary and fixing formulas for provision of funds to the judiciary from provincial budgets.[29] Another two policy actions required the establishment and operationalization of an "Access to Justice Development Fund" (AJDF) in order to provide a non-budgetary stream of money to the judiciary.[30] The fifth and last policy action called for increased funding to the judicial sector on an incremental basis for a 5-year period.[31]

ADB reports "full compliance" with the first and "substantial compliance" with the second policy action.[32] It also reports "full compliance" with the two policy actions pertaining to the AJDF,[33] and for the fifth policy action.[34]

The judiciary was formally separated from the executive in Pakistan in 1996, with the result that the control over judicial budgets was entrusted with the provincial High Courts. This meant that the judiciary no longer had any budgetary accountability to the legislatures, which in turn

[28] Interviews with Mr. Zubair Bhatti, May 2010; and Mr. Kamran Ali Afzal, May 2010.
[29] See ADB, "Program Completion Report," p. 49.
[30] ADB, "Program Completion Report," pp. 49–50.
[31] ADB, "Program Completion Report," pp. 49–50.
[32] ADB, "Program Completion Report," pp. 49–50. In a post-AJP update, the report states that all provinces had adopted the MTBF with a formula for allocation to the lower courts (ibid.).
[33] ADB, "Program Completion Report," pp. 49–50.
[34] ADB, "Program Completion Report," pp. 49–50. Post AJP, the report states that budget allocation to the judiciary has increased in real terms and as a percentage of the overall budget (ibid.).

contributed to waning legislative interest in judicial performance: judicial performance evaluation for the district judiciary was left exclusively to the judicial leadership. This also translated into reduced executive funding for the judiciary over the ensuing period of time and consequent financial constraints for the latter. Regarding budgetary allocation to the judiciary as a perennial problem, AJP recommended the creation of a judicial fund, i.e. the AJDF, for ensuring a regular stream of funds for the judiciary.

As things stood at the time of writing, the AJDF initiative was somewhat jeopardized due to certain imprudent assumptions about interest rates on the fund investment. In view of additional AJP policy actions in this area, the executive did release regular installments of funds to the judiciary over a sustained period of time, mindful of its obligations under the AJP loan covenants and also due to mounting concerns over and adverse public perceptions regarding the deteriorating condition of the courts of first instance.[35] The most obvious problem with the eventual sustained impact of these reforms, however, is that there seems to be no impact. Neither the AJDF (which has many funding windows for financing reforms in various areas of the justice sector, but seems to exist to date only in theory),[36] nor the

[35] See Murtaza and Siddique, *Retrospective Report*.

[36] Murtaza and Siddique, *Retrospective Report*. AJDF is officially stated to be a demand-driven expenditure, characterized by a unique funding mechanism to sustain and deepen reforms in the justice sector. The AJDF brochure encourages lawyers, academicians, researchers, and civil society organizations interested in justice sector reforms to access funds by submitting project proposals to the LJCP wherein the AJDF is located, and which provides secretariat support to the AJDF. The LJCP has constituted a governing body with a mandate to manage and administer the AJDF. The Governing Board (GB) is headed by the Chief Justice of Pakistan. The GB comprises: the Chief Justices of the four Provincial High Courts; the Secretary, Ministry of Finance; the Secretary, Ministry of Law and Justice; and the Secretary LJCP as members. The GB approves areas and projects requiring funding. In addition, it is mandated to provide overseeing and policy guidance functions. A Technical Evaluation Committee (TEC) is meant to ensure sound technical evaluation of the project proposals received by the LJCP from various stakeholders in the justice sector. Besides the Secretary LJCP, the TEC is visualized to comprise stakeholders from the public and private sectors, as well as from civil society – representing special interests, in order to strengthen the quality of its recommendations and outputs. The TEC also has the responsibility for examining, reviewing, and evaluating project proposals, besides proposing modifications to the policies, objects of financing, and rules of access for the funding windows. The seven AJDF funding windows with the percentage of AJDF funds allocated to each window are: Provincial Judicial Development Fund (PJDF) (60.3 percent); Legal Empowerment Fund (LEF) (13.5 percent); Federal Judicial Academy Fund (FJA) (4.5 percent); Fund for Innovations in Legal Education (FILE) (4.5 percent); Legal and Judicial Research Fund (4.5 percent); Fund Management

steady flow of regular funds to the judiciary seem to have translated into any visible improvement in the state of affairs at district judiciary level.[37] It can be seen that the fund allocation has actually increased, for instance, by looking at budgetary allocations for the judiciary in the Punjab between the years 2002 and 2007[38] – at least, a paucity of funds no longer seems to be an issue. Optimal and effective fund utilization, however, is. This logically begs the question whether the transfer of the budgetary function to the judiciary, and also the exclusive entrustment of the AJDF with the judicial leadership, were ultimately productive steps. The so-called introduction and operationalization of MTBFs has reportedly also turned out to be a mere "box ticking" exercise, with the incremental budgeting merely fitted mechanically into MTBF forms, without any effort to ensure that the new framework was understood, fully adopted, and consistently used.[39]

Window (2.7 percent); and Underdeveloped Regions Fund (10 percent). See www.ljcp.gov.pk/Menu%20Items/AJDF/. The LJCP website, however, divulges no progress in terms of access to and utilization of AJDF under its various funding windows.

[37] Interviews with several district judges and the visual inspection of a sample of district courts across the country confirms this, as do other independent reports on the problems being faced by the district judiciary. As a matter of fact, many of the interviewed judges reported slower and more tedious mechanisms of budgetary allocation and the flow of funds to the district judiciary since the budgetary function was transferred from the provincial finance departments to the High Courts. They ascribe this to rigid court hierarchies, lack of budgetary experience, and the time constraints caused by the high volume of routine workflow. This feedback will be discussed at length in the next chapter. See Murtaza and Siddique, *Retrospective Report*.

[38] See Annual Budget Documents, Department of Finance, Government of Punjab, 2003–8.

[39] See R. Blue, R. Hoffman, and L. A. Berg, "Pakistan Rule of Law Assessment – Final Report" (Washington, DC: prepared for USAID/Pakistan by Management System International, November 2008), p. 15. The report delivers a scathing indictment of the lack of impact of AJP's budgetary reforms, as well as the AJDF reforms. It states: "Subordinate court budgets are processed through the High Court, which has attended first to its own perceived needs, and has also had the principal authority over use of the proceeds from the Access to Justice Development Fund (AJDF) established by the Asian Development Bank. MTBF budgeting – not unlike other budget 'fads' worldwide such as zero-based budgeting and planning-programming-budgeting systems (PPBS) – has not succeeded in bringing true strategic planning to the budget process; at best, incremental budgets are merely fitted to an MTBF form, according to officials close to the process. Budget preparation does not seem to focus on responding to actual needs or to determine whether existing staff are contributing to the effectiveness of the judicial process, which becomes significant in view of the sizeable number of staff. This staff, ostensibly serving as budget specialists, has little training in budgeting, much as administrative staff generally receives little initial training and no continuing education. Budgets for the judiciary are closely tied to politics, exemplified by a provincial executive (chief minister) reportedly holding up approval of judicial budgets until judges of his choice could be appointed to the bench" (ibid.). See also interview with Mr. Zubair Bhatti, May 2010.

Support for alternative dispute resolution for caseload reduction.

AJP had two policy actions to support alternative dispute resolution (ADR), and another policy action to look at the impact of ADR and other equity- and efficiency-based interventions.[40]

ADB reports "full compliance" with all three policy actions.[41]

The most significant policy action in this area called for the announcement of a policy to introduce court-annexed ADR. The Ministry of Law (MoL) issued an amendment in the Code of Civil Procedure to enable judges to refer matters to ADR on a voluntary basis.[42] However, by 2008 not a single case had been referred by the courts under that provision.[43] The main obstacle to the initiative of non-court dispute resolution (even though in this case it was supposed to be court-assisted ADR and hence not very far away from the sphere of influence of the courts) was resistance by both the bench and the bar – the judges were not keen to relinquish terrain to ADR, and the lawyers were unhappy to concede lucrative long-drawn-out court processes to more expeditious options.[44] Past and continuing problems for successful introduction of ADR have also emerged from unclear procedures as well as absence of mechanisms for mandatory referrals, the dearth of specialized ADR resource persons, and the lack of a requisite enabling framework as well as training.[45] AJP made a step in the right direction by introducing the necessary enabling legal frameworks. However, due to its court-centric view of the justice sector (discussed above), it once again over-relied on the judicial leadership to tackle the aforementioned issues. It became apparent that the judiciary itself was one of the main obstacles to this reform. In this context, AJP also largely neglected the vital areas of necessary bar

[40] See ADB, "Program Completion Report," pp. 51–2.

[41] ADB, "Program Completion Report," pp. 51–2. Regarding the third policy action, it also reports: "Comprehensive delay reduction study completed in May 2007. Study concluded that ADB measures have been slow to yield the desired results" (ibid., p. 52).

[42] See Code of Civil Procedure, § 89-A.

[43] See "TA Consultant Report" (ADB, 2008). AJP also extended some technical assistance for operationalization, but it did not have any impact due to differences over the draft with the MoL (ibid.).

[44] See Blue, Hoffman, and Berg, "Final Report." This evaluation states: "Further success with ADR will depend on ability to effect cultural changes, especially within the bar, so that lawyers will participate in ADR proceedings, recognize the utility of ADR, and eventually serve as mediators or arbitrators" (ibid., p. 24).

[45] Interview with Syed Ali Murtaza, May 11, 2010.

reforms, as well as the generation of wider public appreciation and resulting demand for ADR alternatives among its potential end-users.

> Establishment of Small Causes Courts.

AJP had one policy action under this "outcome area."[46] ADB reports "full compliance" with the policy action.[47]

This policy action was intended to reduce case delays through special courts for minor claims, with reduced case-processing time. However, as the enabling law did not require the establishment of exclusive courts for this purpose, existing courts/judicial officers were declared to also perform the function of Small Claims and Minor Offences Courts ("SMOC courts"). As a consequence of this policy action, there was no improvement in terms of delay reduction and case disposals. Although ADB reported full compliance, it itself conceded that the "ordinance has been superseded by a new law, which does not require separate SMOC courts. Thus, no SMOC courts were established and very few SMOC cases appear to have been filed."[48] It was simply a case of old wine in new bottles.

> Enact amendments to the Family Courts Act to expedite resolution of family disputes.

AJP visualized one policy action in this area,[49] with which ADB reports "full compliance'.[50]

AJP also sought amendments to the Family Courts Act in order to expedite the resolution of family disputes. The amendments introduced mandatory mediation as well as fixed time limits for disposals. However, once made operational, recourse to mediation became a mechanical exercise with no tangible results, rather than a closely supervized and incrementally improved process to achieve clear goals. The stated time limits for disposal also turned out to be unrealistic to adhere to, in view of the prevailing culture of delay. Furthermore, the legal amendments did

[46] See ADB, "Program Completion Report," p. 51.

[47] ADB, "Program Completion Report," p. 51. According to some commentators, this policy action is a good example of short-term goal setting and mere box ticking. Establishment of effective "small causes" courts required a longer-term vision and deeper commitment to creating separate courts with simpler and shorter procedures and processes, specially trained judges, a cultural paradigm shift, education and empowerment of end-users, and, thus, the development of a very different and simpler set of operations for addressing small causes. Interview with Syed Ali Murtaza, May 11, 2010.

[48] See ADB, "Program Completion Report," p. 51.

[49] ADB, "Program Completion Report," p. 50.

[50] ADB, "Program Completion Report," p. 50.

not provide for a mechanism of marriage counselors and entrusted the business of mediation to the judges instead. This was another case of well-intentioned but ill-considered reform that produced less than the desired impact and also certain unintended negative consequences, as it did not fully appreciate the social and cultural context in which the reform was being introduced. In societies such as Pakistan – where the micro-family has not become the norm – the larger family, community, and clan frequently play an important role in resolving family disputes. Courts are invariably looked upon as the undesirable last resort in such situations. While speed of resolution is generally a desirable goal, in delicate family disputes, time and good counseling can play a more constructive role than quick verdicts of winners and losers – which can be especially unsuitable where the disputants are embittered spouses and there are dependent children. A purely court-based solution to family disputes – emerging once again from a court-centric view of the world – without requisite attention to the provision of meaningful counseling and mediation services, was always going to result in some adverse consequences in situations impacting many parties, particularly minors.[51]

Improving internal governance of judicial institutions.

AJP had a total of six policy actions in this area.[52] ADB reports "full compliance" with all six of them.[53]

Improving the internal governance of judicial institutions was a key area of focus for the AJP – it had a mixed menu of reforms for the same. Policy actions in the area included the introduction of plans for the professionalization of management at the High Courts, the initiation of direct supervision by High Court judges of the office of the Member Inspection Team (MIT) – an internal High Court unit tasked with looking into complaints against district court judges and monitoring

[51] See Murtaza and Siddique, *Retrospective Report*. See also the evaluation that: "There clearly is not the same base of support for ADR in family cases as in commercial ones. There are some NGOs interested in this area but it likely will take a good deal more leadership and initiative to get family ADR programs underway." (Blue, Hoffman, and Berg, "Final Report," p. 34.

[52] See ADB, "Program Completion Report," pp. 60–2.

[53] ADB, "Program Completion Report," pp. 60–2. Post AJP, the report states that: "While annual reports are being published, quality varies and there is not a set of agreed upon indicators. Thus difficult to track performance consistently. A lot of reforms are not being monitored (e.g. gender mainstreaming). Monitoring is not being done on a consolidated basis" (ibid., p. 61).

district court outputs, the introduction of external audits of court expenditures, the inception of the practice of regular inspections of the district courts by High Court judges, the publication of annual reports, and the holding of regular judicial conferences. The most successful of these interventions was the publication of the annual reports, which were meant to be a public accountability mechanism for evaluation of judicial performance. These reports, which are now published regularly, allow some measure of public scrutiny of judicial performance. However, the general quality of data provided in these reports is at times unreliable or contradictory, and also not at a sufficient level of disaggregation to allow for deeper analysis. Poor and inadequate data collection generally remains a problem across the judiciary, which further constrains informed and meaningful policy-making.

Successful implementation and consolidation of the other aforementioned policy actions required necessary follow-up steps, such as the formulation of detailed procedures, the recruitment of professional court management personnel, and extensive automation of court processes and record keeping. However, none of this has quite materialized at the desired pace, primarily because once AJP arrived, institutional inertia, or in some cases, stiff opposition from within the judiciary to some of these steps, blocked progress. Failure to make much headway in some of these areas, even during the active life of the AJP, was due to the poor capacity within AJP to negotiate and push these reforms in the face of opposition by the High Courts and legal bars. Reforms such as the appointment of professional court administrators and the automation of court process were opposed by some judicial quarters as they were seen to offset existing judicial discretion and control in the manner of acceptance and processing of cases. Non-involvement of other important stakeholders and the consequent paucity of sustained social demand for change also contributed to the petering out of these reform interventions.[54] The MIT mechanism has also come under criticism for lacking professional evaluative expertise.[55] The annual national judicial conferences, on the other hand, are a quintessential example of how a more or less empty ritual is followed every year – the

[54] See Murtaza and Siddique, *Retrospective Report*.

[55] See Blue, Hoffman, and Berg, "Final Report." According to the assessment: "More recently, the ADB supported the institution of an incentive system, which provides monetary rewards based largely on judges' efficiency in disposing cases, along with a Member Inspection Team (MIT) that is supposed to monitor lower court judges' performance. However, the MITs are usually made up of judges rather than professional evaluators, and these systems are not linked to judges' careers." (Ibid., p. 24.)

participating cast of these brief and weakly structured engagements largely limited to the inner coterie of judges and lawyers. Hence, they provide limited opportunity for any divergence of perspectives and a free exchange of informed ideas for reform.[56]

Judicial appointments.

AJP had three policy actions in this area.[57] ADB reported "full compliance" with all three of them.[58]

Regular and qualitatively enhanced judicial appointments in the courts of first instance have a direct and major positive impact on a number of key "access to justice determinants," such as the quality of judgments, the speed of case disposals, a stricter adherence to due process requirements, more effective protection of human rights, and the enhancement of public confidence in courts. Cognizant of this, through one of its policy actions, AJP called for a policy that required the filling up of lower court vacancies within 120 days of their falling vacant. Another policy action required the adoption of transparent recruitment procedures. The expectation of filling up district court vacancies within the given timeframe was unrealistic to say the least. It erroneously assumed the availability of sufficient, well-trained candidates on a regular basis, who could be hired within such a short time frame. The state of legal education in the country, however, highlighted the impracticality of this idea. Unless the appointment criteria were drastically lowered, there were simply not enough capable candidates for the vacant positions on a consistent basis. Available data on past lower court appointments demonstrates the existence of this acute supply-side limitation.[59] Another important initiative under this "outcome area" was to encourage more women to enter the

[56] See interview with Dr. Ali Qazilbash, Legal Academic, Lahore, June 2010.
[57] See ADB, "Program Completion Report," pp. 63–4.
[58] ADB, "Program Completion Report," pp. 63–4.
[59] E.g. the data from Punjab (2004–8) divulges consistently very low percentages of candidates who were recommended for appointment as judicial officers, having successfully cleared a written examination and an interview. As a result, most of the available posts for the positions of civil judges were left vacant. See Punjab Public Service Commission data on judicial appointments, 2010. For instance, from 2004 to 2008, of all the candidates who took the written examination for the posts of civil judges, a mere 9.4, 2.7, 11.9, 13.7, 2.4, and 24.6 percent actually passed the written examination (the last two figures are for female and male candidates respectively in 2008; the first four figures are only for male candidates appearing in the examination from 2004 to 2007). An even smaller percentage of candidates were actually recommended for appointment upon successfully clearing the interview stage (ibid.).

judiciary through an affirmative action recruitment process. This initiative was relatively more successful and led to an increase in the number of female judges from 85 to 171.[60]

Another important AJP policy action under this "outcome area" was the improvement of judicial salaries, given the widely held and legitimate notion that poor salaries adversely affected both job satisfaction and the ability of the judicial profession to attract talent. However, AJP only secured a marginal increase in salaries.[61] The Pakistani district judiciary continues to face weak financial incentive structures, poor facilities, and the various problems posed by a highly bureaucratic and centralized administrative system. Despite AJP policy actions to introduce greater transparency to the administration of district courts and the recruitment of district judges, the Chief Justices of the provincial High Courts continue to exercise considerable, and at times controversial, discretion in the selection, transfer, and career progression of district judges.[62]

Separation of civil and criminal courts.

[60] See Blue, Hoffman, and Berg, "Final Report," p. 35.

[61] See Murtaza and Siddique, *Retrospective Report*. The real increase came in 2008, when the Punjab Government increased judges' salaries threefold, although in absolute terms they are still meager. Furthermore, not insignificant variations still exist in the salary scales of district court judges in different provinces (ibid.).

[62] See Blue, Hoffman, and Berg, "Final Report," pp. 12–13. According to the authors: "Unlike High Court judges, who are usually selected from among prominent members of the High Court Bar in each province, lower court judges reach the bench through a qualifying examination administered by the Public Service Commission, and generally serve their entire careers on the bench. They are generally viewed as bureaucrats, and have historically earned relatively meager salaries. Although salaries and allowances have recently been raised relative to other civil servants, they remain less than sufficient. Judges are overworked due to the insufficient complement of subordinate judges, and work in poor conditions. They receive a brief 2 months of training upon joining the bench, and there are few opportunities for refresher training. Career incentives are limited, since lower court judges are rarely elevated to the High Court, and judges are transferred frequently. These factors and conditions have made it difficult to recruit candidates to serve as judges. The team learned that in Punjab, for instance, an attempt to recruit 100 new judges yielded only 11 qualified candidates. Lacking sufficient resources and support for their independence, lower court judges are frequently subject to pressure. Lower court judges are also subservient to the High Courts, particularly the Chief Justice, who wields considerable power over the entire judiciary in each province. In addition to controlling most management functions in the courts, the Chief Justice personally controls the transfer and selection of lower court judges, a process that is rarely transparent … In practice, the transfer of lower court judges has often been subject to outside influence, exercised via the High Court. Since most cases are systematically appealed, lower court judges are not empowered to exercise much discretion. If the High Court Judges do not uphold sensitive or difficult decisions by lower court judges at the appeal level and instead succumb to political pressure, these lower court judges are left vulnerable and unable to resist

AJP had two policy actions in this area.[63] ADB reports "full compliance" with both of them.[64]

The Pakistani civil and criminal courts are established and operate under separate statutory regimes. However, the prevalent practice is essentially that of appointing the same individuals as judges in both types of courts – regardless of the nature of their prior experience, their professional bent and inclination, and any exposure to specialized pre-service training. Thus, a functional specialization does not really exist as an institutional arrangement, even though practically speaking one finds the civil and criminal courts operating separately. The AJP pushed for such functional separation through the introduction and implementation of "phased plans," in order to augment specialization and introduce particularized training in case management – which differs markedly in Civil and Criminal courts. However, efforts to bring about such separation were unsuccessful, despite AJP claims to the contrary in its policy compliance reports. The provincial High Courts did not adopt a specific position on the separation question, and instead left the choice to the District and Sessions Judges. As a result, actual separation remains erratic and piecemeal. Full functional separation is unlikely to be achieved unless a holistic review of the structure and functions of the district courts is undertaken. It is important to note that many district court judges also do not support this intervention, as it is likely to result in loss of turf, prestige, and control, quite apart from involving additional work and extensive introspection and deliberations about making a successful transition. The importance of a deeper and wider discourse, engagement and negotiation once again comes through as a necessary prerequisite for the successful introduction of a major structural reform. The mere bureaucratic approval of a policy condition was predictably going to be ineffectual.[65]

Delay reduction.

all types of pressure. The high level of influence by the High Court also creates opportunities for intervention in individual cases. Although the ability of the judiciary to resist pressure has varied across time through the different provinces, the recent trend – since November 2007 – is generally toward less independence. The forcing out of judges at the High Court level resonated throughout the judiciary, opening lower court judges to greater pressure without a High Court that is independent enough to back them up." (Ibid.)

[63] See ADB, "Program Completion Report," p. 54.

[64] ADB, "Program Completion Report," p. 54.

[65] See Murtaza and Siddique, *Retrospective Report*.

AJP had four policy actions in this area.[66] It reported "full compliance" with all four of them.[67]

Since court delays and case pendency reduction were AJP's most prominent aims, as well as the underlying ethos of most of its judiciary-related reforms, its level of success in achieving these goals merits a detailed examination. AJP aimed to pursue these goals through: policy actions mandating the High Courts to develop delay reduction programs with clear guidelines; the establishment of dedicated full-time benches for commercial cases in the Lahore and Sindh High Courts; reforms in the area of service processing; and the introduction of performance based incentives for judges to adopt delay reduction procedures.[68] The overall impact of AJP's delay reduction reforms can be determined by gauging any improvement in certain key performance indicators in terms of court efficiency. Case disposal indices, for instance, not only provide direct information about the efficiency and quantity of dispositions, they also furnish a good insight into the factors affecting disposal, i.e. the improvement and effectiveness of judicial governance, training, case management, incentive structures, and work environments.

Performance quality indices, on the other hand, can be determined, for instance, by looking at the number of judicial decisions upheld in appeal from the district courts, and also the number of appeals allowed per case by the appellate courts. However, the statistics that are required for determining the quality of judgments are largely not collected in Pakistan. Any available information is both fragmented and lacks historical continuity. Thus, it is very hard to statistically gauge an improvement or decline in the quality of legal judgments. The data on the number of newly instituted and disposed cases since 2003 is, however, available – thanks to the AJP policy action calling for the publication of annual performance reports by the High Courts. A province-wise analysis of case disposal indices from 2003 to 2008 – the peak period of AJP activity in this area – is as follows:

The Punjab

A review of the official data from the Lahore High Court indicates that case institutions (i.e. the number of new cases filed in the courts in a year) have risen steadily since 2003, except for occasional

[66] See ADB, "Program Completion Report," pp. 52–4.
[67] ADB, "Program Completion Report," pp. 52–4.
[68] ADB, "Program Completion Report," pp. 52–4.

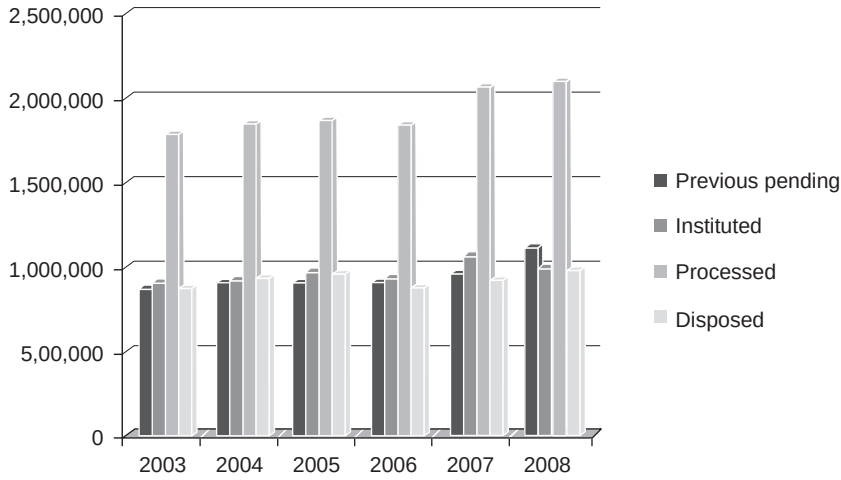


Figure 5.1 Institution and disposal of criminal and civil cases: level one courts in the Punjab

Source: Murtaza and Siddique, *Retrospective Report*.

Note: Level one courts indicate the lowest courts in the Pakistani judicial hierarchy and include the courts of civil judges, judicial magistrates, magistrates (section 30), senior civil judges, and family judges. The data used for this chart is an aggregate for all of these courts. Level two courts denote the next tier of courts between level one and up to the levels of the Sessions Courts/District Judges/Additional District Judges (ibid.).

fluctuations.[69] The data also divulges that only once have case disposals actually overtaken new case institutions in the case of Lahore High Court; twice in the case of the sessions/district courts in the Punjab; and once in the case of civil judge/magistrates' courts in the Punjab. Thus, although the net case disposals have increased, they have not risen sufficiently to produce any significant change in the net case pendency each year.

Figures 5.1, 5.2, and 5.3 clearly indicate that despite AJP's interventions for delay and case pendency reduction, the District Courts in the Punjab have not managed to shed their heavy workload or to create a gap between case pendency and case disposal. This is essentially due to the fact that the number of new cases instituted each year surpasses the number of cases which the courts are actually able to dispose of. In other

[69] Lahore High Court Annual Reports 2003–8.

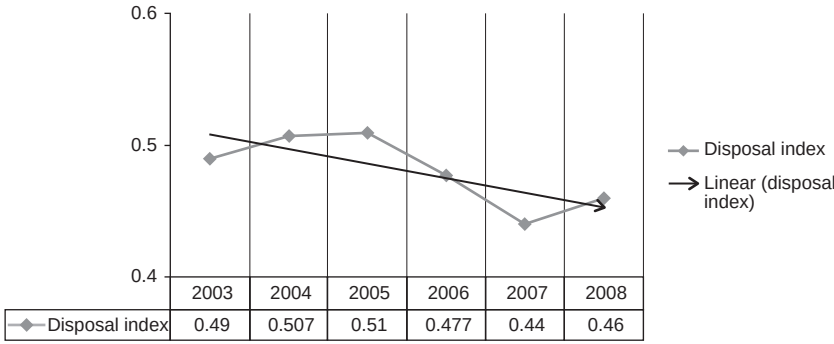


Figure 5.2 Disposal index: level one courts in the Punjab
Source: Murtaza and Siddique, *Retrospective Report*.

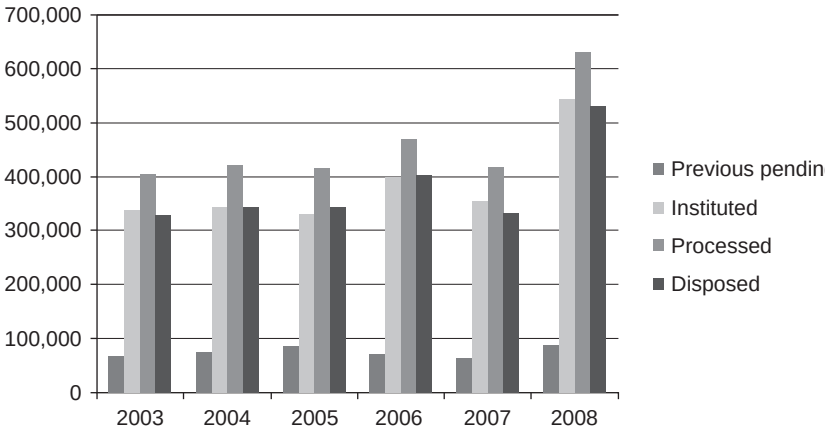
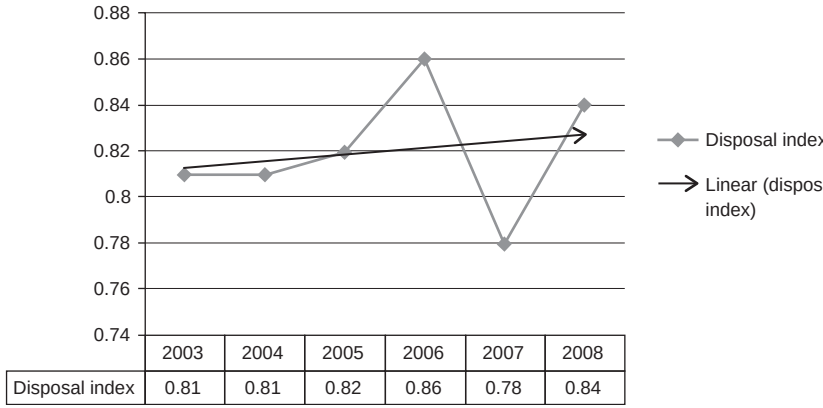


Figure 5.3 Institution and disposal of criminal and civil cases in the Punjab: level two courts
Source: Murtaza and Siddique, *Retrospective Report*.

words, even though the courts are generally disposing of a higher number of cases each year – and case processing is also steadily increasing – the new case inflow is also consistently rising and has regularly stayed ahead of case disposals. Thus, it is a constant catch-up game. In this context, it merits careful attention as to how exactly the constantly increasing case processing pressures are affecting the quality of judicial decisions. This analysis is accurate for both level one and level two courts in the Punjab. Very similar trends are on display in Figure 5.4, which examines the data for the Sessions



	2003	2004	2005	2006	2007	2008
Disposal index	0.81	0.81	0.82	0.86	0.78	0.84

Figure 5.4 Disposal index: sessions courts/district judges/additional district judges
Source: Murtaza and Siddique, *Retrospective Report*.

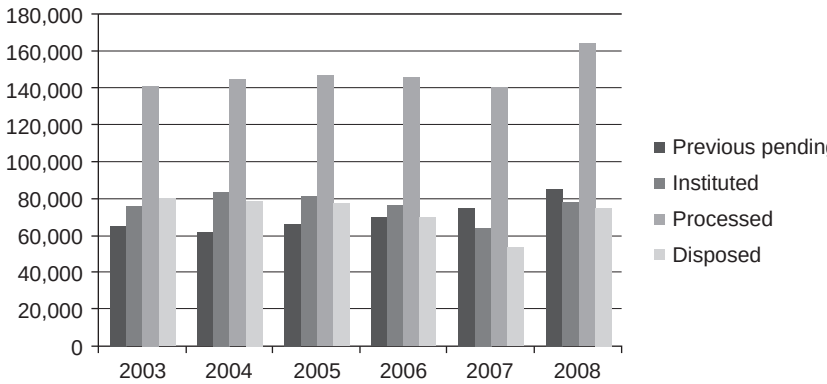
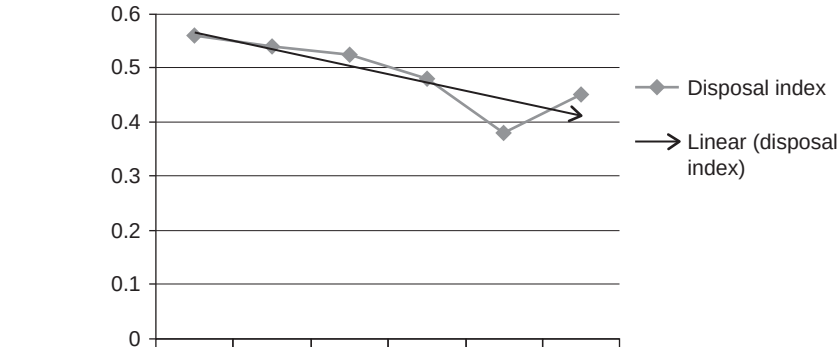


Figure 5.5 Institution and disposal of cases in Lahore High Court
Source: Murtaza and Siddique, *Retrospective Report*.

Courts/District Judges/Additional District Judges, and also Figures 5.5 and 5.6, which visually present the data for the Lahore High Court.

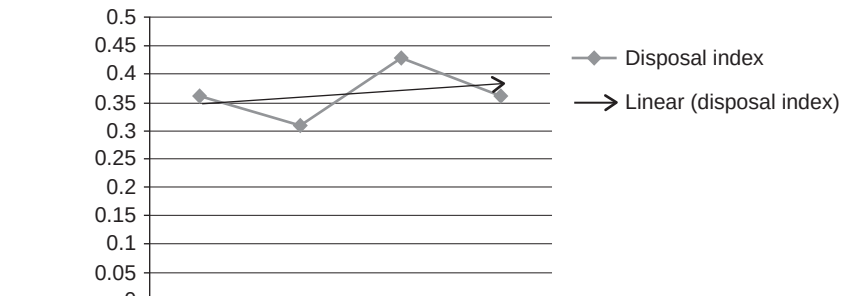
Sindh

The data from Sindh High Court shows a sudden and unexplained fall in the institution of new cases in 2005, which may be due to the



	2003	2004	2005	2006	2007	2008
Disposal index	0.56	0.54	0.525	0.48	0.38	0.45

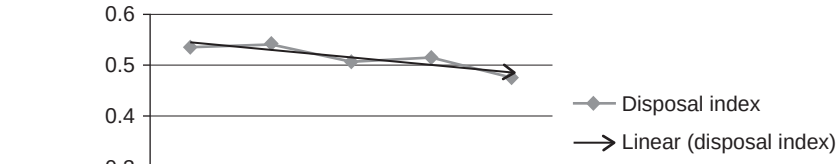
Figure 5.6 Disposal index: Lahore High Court
Source: Murtaza and Siddique, *Retrospective Report*.



	2003	2004	2005	2008
Disposal index	0.36	0.308	0.429	0.36

Figure 5.7 Disposal index: Sindh High Court
Source: Murtaza and Siddique, *Retrospective Report*.

increased pecuniary jurisdiction of the Sindh district courts and consequently less institution of original civil suits in the Sindh High Court. Overall, case disposals have overtaken new case institutions only once in the case of the Sindh High Court, and three times in the case of lower courts. However, it is also interesting to note that, since 2003, net disposals in the lower courts have fallen, with the exception of 1 year.



	2003	2004	2005	2006	2007
Disposal index	0.55	0.56	0.51	0.52	0.466

Figure 5.8 Disposal index: Sindh District Judiciary
Source: Murtaza and Siddique, *Retrospective Report*.

Baluchistan

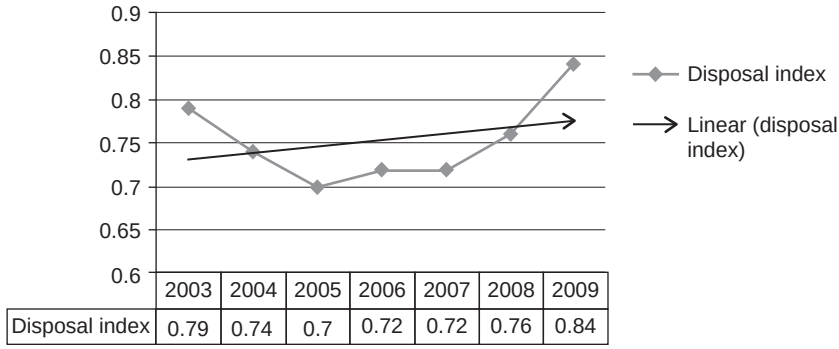
In Baluchistan, institution of new cases in the High Court has generally remained stable since 2003. This is due to the special context of the Baluchi society, where *jirgas*[70] and the community handle a large number of disputes. Institution of cases in lower courts has, however, registered a significant increase since 2007, possibly due to increased urbanization. In contrast, case disposals in the lower courts have only surpassed new case institutions three times in a 7-year period.

NWFP/KPK

In NWFP/Khyber Pakhtunkhwa, which the AJP declared as the best-performing province in terms of the success of its case management and court efficiency reforms, new case institution has registered a decrease since 2003, with the exception of 2 years. Meanwhile, case disposals have surpassed new case institution only once in the case of the High Court during a 5-year period, and twice in the case of lower courts during a 4-year period.

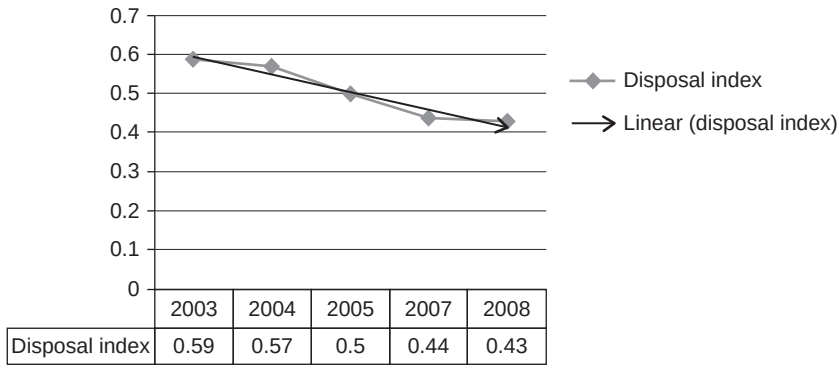
Figures 5.1 to 5.11 demonstrate that AJP was largely unsuccessful in achieving any marked improvement in court efficiencies, despite the

[70] "*Jirga*" is a term used for a popular and widely used dispute resolution mechanism in certain areas of Khyber-Pakhtunkhwa and Baluchistan. It comprises tribal elders and a jury of selected or all present tribesmen.



	2003	2004	2005	2006	2007	2008	2009
Disposal index	0.79	0.74	0.7	0.72	0.72	0.76	0.84

Figure 5.9 Disposal index: Lower Courts, Baluchistan
Source: Murtaza and Siddique, *Retrospective Report*.

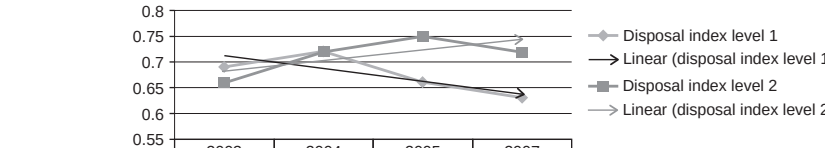


	2003	2004	2005	2007	2008
Disposal index	0.59	0.57	0.5	0.44	0.43

Figure 5.10 Disposal index: Peshawar High Court
Source: Murtaza and Siddique, *Retrospective Report*.

predominant focus of its reforms in this area. This conclusion should not be surprising. The correlation between the construction of courthouses – infrastructure development was after all where the overwhelming bulk of the AJP funds were spent – and court efficiencies, is at best tenuous.[71] The most that can be said is that the existence of adequate courthouses is a necessary starting point and essentially a preamble for other significant

[71] See Jensen, "Rule of Law."



	2003	2004	2005	2007
Disposal index level 1	0.69	0.72	0.66	0.63
Disposal index level 2	0.66	0.72	0.75	0.72

Figure 5.11 Disposal index: level one and level two courts, KPK
Source: Murtaza and Siddique, *Retrospective Report*.

tangible and intangible reforms, and that the AJP's interventions at this initial stage met with some degree of success. Case disposal numbers, however, indicate that the AJP-led reforms in this area only generated marginal efficiency improvements. Figures 5.1 to 5.11 also indicate that the AJP was completely unable to address fast-growing new case institutions. The AJP's neglect of increasing litigation as an important factor – not only in terms of it being a primary contributor to rising caseloads and court delays, but also as an integral insight into the growing disputes and the resulting litigation in society – is very difficult to understand in hindsight.

I shall now proceed to a brief review of the only two AJP "outcome areas" that directly pertained to legal empowerment of the end-users of the justice system and emphasized the demand aspects and constraints of the justice equation.

Legal literacy and empowerment.

AJP visualized five policy actions in this area.[72] ADB reports "full compliance" with all five policy actions.[73]

AJP undertook certain initial steps toward the promotion of legal empowerment through the formal operationalization of a grants system, i.e. the legal empowerment window in the AJDF for promoting legal literacy, which has been briefly discussed above. This was meant to provide ongoing support for public information campaigns using different media, advocacy for the rights of the poor and the disadvantaged (especially women), public interest litigation, publication of laws and rules in the official gazette, the establishment of information kiosks, publication of simplified versions of

[72] See ADB, "Program Completion Report," pp. 56, 57, 59, 60.
[73] ADB, "Program Completion Report," pp. 56, 57, 59.

laws in Urdu, and the setting up of citizen court liaison committees and bench bar committees.[74] The grant option is a standard donor response to complex problems when there is reluctance to invest more time and effort in order to understand the actual nature of the complicated challenges of legal disempowerment and the various factors contributing to it. For a challenging context like Pakistan, with its low levels of literacy, several tiers of societal exploitation, and weak civil society organizations and rights groups, simply offering funds for potential legal empowerment activities was always going to be a reform intervention with a far from certain outcome. A demand-driven financial initiative is, after all, unlikely to work in a social milieu where the fundamental demand for change, as well as the capacity to coordinate and galvanize such demand, is scarce in the first place. As to some of the other steps taken by the AJP, laws and rules were already being published in the official gazette, and hence the AJP's intervention pertaining to the same was duplicative and largely unnecessary. The AJP's most promising intervention for promoting legal literacy was its support for the publication of simplified versions of laws and regulations in Urdu. This, however, never quite materialized due to the lack of interest from the provincial departments of law and the MoL. Successful implementation of this reform could have reduced the litigants' over-reliance on lawyers, as well as encouraged meaningful progress toward helping those who do not understand English to better understand their rights and claims.

Post AJP, the utilization, sustainability, upgradation, and continuing effectiveness of its financial support mechanism for various initiatives, such as the setting up of information kiosks, the public information and rights advocacy campaigns, public interest litigation, and citizen court liaison committees, as well as bench bar committees, is generally quite suspect. This is primarily due to the lack of institutional ownership, together with the AJP's low emphasis on generating sustainable indigenous demand for and ownership in reform. As a result, beyond the model districts in which these schemes were introduced by the AJP, they are more or less non-existent.[75]

Legal education.

AJP had three policy actions in this area.[76] ADB reports "full compliance" with all three of them.[77]

[74] ADB, "Program Completion Report," pp. 56, 57, 59, 60.
[75] See Murtaza and Siddique, *Retrospective Report*.
[76] See ADB, "Program Completion Report," p. 62.
[77] ADB, "Program Completion Report," pp. 62–3.

The quality of legal education has a direct impact on the capacity to absorb new ideas; on the real worth of judges, legal practitioners, legal research, and policy-making; on citizen legal awareness and empowerment; and on the depth and sustainability of academic, policy, and democratic discourses. AJP's three policy actions regarding legal education included a policy announcement about: the establishment of centers of excellence in legal education (CELEs); the establishment of a "funding window" in the AJDF for supporting innovations in legal education; and, finally, the actual establishment of the proposed CELEs.[78] Legal education in Pakistan is historically neglected and reforms have not materialized or worked due to multiple reasons. These include, inter alia, unclear regulatory arrangements and overlapping regulatory jurisdictions, but no real institutional stakeholders; low bars of entry to law schools and also the paucity of new and dynamic law schools; outdated legal curricula; inadequate teaching pedagogy; a dearth of full-time, research-focused academics, with consequent reliance by law colleges on part-time faculties; lack of financial and other career incentives for the legal academy; inadequate infrastructure and facilities; unsatisfactory governance of law schools; a near absence of a research culture and legal textbooks/treatises; and less then appreciative social and cultural attitudes to a career in the academy.[79] The legal bars have more or less usurped a central role in the governance of legal education, when they ought to have concentrated on the provision of continuing legal education for lawyers, regular and stringent bar examinations, and competitive bar examination curricula – all of which are equally underdeveloped areas even though they lie much more directly in their domain. Meanwhile, the federal institution entrusted with the regulation of all higher education in the country – the Higher Education Commission (HEC) – has neither displayed the will nor the capacity to perform its necessary role in legal education regulation and reform.[80]

There could not be a greater contrast between the official reporting of successful compliance with reform policy conditions and the utter actual

[78] The first policy action was linked to the release of the first tranche of the AJP loan. Actual implementation was deferred to the third and last tranche, whereas legal education reform should have been taken up on a priority basis from the very start. This is both because it is a difficult and time-consuming area of reform, and also because it is of fundamental importance to the overall and sustainable improvement in the justice sector. See Murtaza and Siddique, *Retrospective Report*.

[79] See Siddique, "Martial Laws and Lawyers."

[80] Siddique, "Martial Laws and Lawyers."

failure of reform, as reflected in the case of the AJP's hastily aborted forays into the reform of legal education in Pakistan. To date, none of the proposed CELEs has been established and there seems to be no likelihood that any will in the near future. The funding window in the AJDF for "innovations in legal education" also remains completely unutilized.[81] The failure to set up the CELEs is a classic case of superficial donor commitment to what are actually the more difficult "soft" reforms. The AJP simply backed off when faced with entrenched institutional and personal rivalries, the acute weakness of wider public information about educational reform, and the lack of demand and requisite empowerment to push for this reform.[82] In a nutshell, the Higher Education Commission of Pakistan

[81] Between 2004 and 2008, the author was directly involved with the design of the CELE project and its implementation plan, as a consultant to the ADB. He was subsequently also an advisor to the HEC when the idea of setting up the CELEs was being pursued. He held multiple meetings and negotiations with the judicial leadership, the HEC, the Pakistan Bar Council (PBC), the initial staff hired to operationalize the CELE project, legal academics, leading lawyers, and various relevant departments, including the Federal Judicial Academy (FJA), the MoL, and the Law & Justice Commission of Pakistan (LJCP). When the AJP was inaugurated in 2001, there were 53 public and private law colleges in Pakistan and 20,117 law students. See *Pakistan Statistical Yearbook, 2007* (Federal Bureau of Statistics, Government of Pakistan), sections 6.7 and 6.8 Education. Despite the passage of 10 years, the state of affairs in these colleges (the number of which has somewhat increased) remains the same. Public sector law colleges use outdated curricula, and teaching and examination methodologies. Private sector law colleges have better curricula and syllabi, but both types of colleges face faculty size and quality constraints and have no tradition of legal analysis or research. Many private colleges are also of a low quality and operate under a purely profit-seeking imperative. The public law colleges, on the other hand, suffer from internal political strife and highly bureaucratic governance systems that stifle all innovation and qualitative growth. A major contributory reason is the regulatory overlaps and lack of appropriate regulations. Both PBC and HEC are entrusted with the regulation of legal education in Pakistan under different statutes. As a result, neither regulates. See Siddique, "Martial Laws and Lawyers."

[82] It merits looking closely at the CELE debacle. Given the acute shortcomings of existing legal education in Pakistan and the vital importance of quality legal education, the need for rigorous indigenous research for better informing policy-making and legislation, and the role of the legal academy in informing public opinion and strengthening democratic discourse, legal education reform was highlighted as an area by the AJP. It initially earmarked an amount of $5 million for setting up Centers of Excellence in Legal Education (CELEs). The CELE idea was to: (i) identify the most promising public and private law colleges for further capacity building and technical investment over a period of time; (ii) set up an evaluation system for assessing the initial needs of these institutions and addressing them through strategic, regular investments in, inter alia, faculty building, curricular development, pedagogical and evaluative systems improvement, enhancing research capacity, and improvement of library and electronic research facilities; and (iii) conduct regular qualitative evaluation of these selected institutions after periodic capacity and quality building investments, and also their accreditation according to their performance through an independent accreditation system housed in a suitable Pakistani institution and assisted by international

(HEC) developed serious differences with the MoL on various administrative and operational matters. There was also a change of leadership at the AJP Program Management Unit (PMU) and the PMU fell short of providing the necessary leadership to resolve matters between HEC and the MoL. The Pakistan Bar Council (PBC, the joint regulator of legal education in the country together with HEC) remained aloof with regard to this initiative. At times it was even hostile, as the AJP had earlier had limited and fruitless engagements in an attempt to persuade the legal fraternity to see eye to eye with the AJP on their vision of bar reforms. The bar leadership resented the fact that since their last encounter, the AJP had largely ignored them, together with the general area of bar reforms. HEC also did not develop its own institutional capacity for pushing the CELE initiative. Although the terms of reference (ToR) and contracts for hiring external legal education specialists were developed, no one was ever hired as the stalemate between HEC and the MoL festered. After a brief flash of initial exuberance over the idea, the AJP decided to move on after some time. It subsequently made some attempts to revive the project, but the momentum was lost: the project never saw the light of the day and the sorry state of legal education in the country persists.

Evaluation findings

The detailed analysis of select representative AJP interventions undertaken above demonstrates that the AJP erroneously equated the vast and complex concept of the "justice sector" with the narrower operation of judges and courtrooms. It largely ignored the various linkages,

and regional legal education experts. Non-performing institutions were then supposed to be closed down after a 3-year period of sustained investment and evaluation, while good performers were expected and assisted to retain their improved quality and resulting upgradation in the accreditation system. The FJA, LJC, and HEC were evaluated as potential supervizing institutions for this initiative. Although all of them were found to lack requisite capacity, HEC was eventually selected as it showed the most interest in the initiative. This was also because of HEC's official mandate as the regulatory authority for all higher education institutions, as well as its regular interface and institutional leverage with the same. Further, HEC also agreed to invest some of its own funds toward this initiative, over and above what the AJP had agreed to provide. The Lahore University of Management Sciences (LUMS) also agreed to lend assistance as a possible role model, given that it had recently introduced a new and much improved legal curriculum for a 5-year BA/LLB degree. Furthermore, LUMS had invested in developing a full-time research faculty and a more exciting vision and enabling institutional structure for legal education that was in line with international best practices. However, the project, for reasons discussed in the main text, never took off.

mechanisms, modus, and at times conflicting official and unofficial normative frameworks and perspectives for reform that exist within this sector, as well as its all-important societal context. While adhering to the idea that judicial administrative capacity building and efficiency enhancement of courts would bring about greater access to justice for all, it discounted the reasons for the underlying societal disempowerments and vulnerabilities that impede citizen access to justice. Particularly, none of its policy actions under the twelve specific "outcome areas" was designed or implemented in a manner so as to address the problem of poverty as a contributor to lack of access to justice. As a matter of fact, only two out of the twenty-five "outcome areas" feebly attempted to look at the end-users of justice and the gargantuan challenge of legal disempowerment.

While choosing to equate "justice" solely with the judges and courts, the AJP more or less exclusively set out to achieve "efficiency" enhancement of court-based dispute resolution. It not only disregarded any evaluation of the actual quality of justice emerging from the courts, but essentially reduced the analysis of court contestations to formulaic number-crunching on aggregates of case institution, disposal, and pendency. It paid little heed to the equity, fairness, and distributive consequences of the underlying rules governing these contestations, or to the complex interplay with important societal phenomena. Furthermore, it lacked meaningful comprehension of entrenched, recurrent, and rampant disputes – which was necessary even for the successful pursuit of the narrower goal of arresting the trends of constantly escalating, often frivolous and/or coercive, and invariably delayed litigation in the country.

The AJP's choice of implementation strategy and stakeholders of reform – particularly for the twelve reform "outcome areas" for the judiciary/courts, suffered, *inter alia*, from two major self-defeating dimensions.[83] The first dimension was that in the AJP reform dialogues and consultative engagements, overwhelming primacy was accorded to the courts, judges, lawyers, and other legal practitioners over and above, and often to the exclusion of, other equally important players in the

[83] More particularly, "capacity enhancement of the Law Commission"; "formation of a National Judicial Policy"; "restructuring of the court structure and the ambit of judicial powers" (as manifested in reforms pertaining to "tribunals," "special courts" and "executive magistrates," and "the separation of civil and criminal courts"); "creation of new courts" (the "Small Causes Courts") or "modification of existing ones" ("Family Courts"); and other reforms directed at "court management and judicial governance."

justice sector.[84] This unsurprisingly resulted in myopic outlooks and limited options. As a corollary, the second dimension was that the reform prescriptions were solely left to be determined and controlled by, and were dependent for their implementation on, the relatively narrow, mostly technocratic, and at times highly parochial, institutional, and group perspectives of the coterie of the judicial and legal practitioners. As the analysis conducted above posits, this caused almost all of the judicial and court-related reforms to remain ineffectual, unsustainable, and of superficial impact. To reiterate a few examples, the post-reform "Law Commission" and "National Judicial Policy Making" body emerged as highly ossified bureaucratic entities. Dominated by judges, they became extended secretariats of the Chief Justice, with little output of any note. Reforms pertaining to "tribunals," "special courts," and "executive magistrates," on the other hand, basically led to tighter judicial control over forums created to meet special dispute resolution needs. They actually functioned better when they were relatively autonomous of the strangulating mainstream judicial framework. The AJP reforms thus resulted in the reduction of these special forums to the same lack of dynamism, slowness of operation, and bureaucratic inertia as the ordinary courts.

The AJP's neglect of vital stakeholders also contributed to an absence of opportunities for the same to give feedback on and extend accountability to other important AJP reforms, such as "improving internal governance of judicial institutions" and "judicial appointments." As a result, apart from some perfunctory improvements, these "outcome areas" turned into narrowly designed initiatives by the judges (who were being expected to reform themselves) that had limited and unsustainable impact. The AJP's failure in making any concurrent or subsequent attempts to generate transparency, general awareness, wider demand, diverse stakeholder ownership, meaningful impact assessment, and public accountability for the reform interventions was also a direct outcome of reform being defined exclusively by the AJP-anointed judicial/legal coterie, as well as being dependent on their sporadic and lackluster commitment to implementation.

By according overwhelming primacy to the courts as the terrain for reform, and to judges and select lawyers as the instruments of reform,

[84] These include, inter alia, citizen groups, NGOs, human rights activists, consumer advocates, academics, policy experts, media, labor unions, farmer collectives, political parties, and legislative bodies.

AJP also neglected the potential enhancement of several alternatives for dispute resolution in order to make justice more accessible to ordinary citizens. These included possible mechanisms for court-assisted arbitration and mediation, various social and commercial practices for settling disputes, pre-trial diversions, and a vast array of local and regional non-court dispute resolution mechanisms of both historical provenance and more recent origin. At the same time, the proposed reform under the solitary "outcome area" that visualized the introduction of court-assisted arbitration was allowed to flounder. This was unequivocally the result of reform implementation being entrusted to the judges themselves. It became apparent that the judges displayed no desire to relinquish turf and found convenient allies in similarly motivated groups of lawyers who benefited from long-drawn court battles. This ensured that much-needed reforms never took off due to self-created technical hurdles. Furthermore, even where effective social regulation made more sense, legal sanctions and court-based adjudicative solutions were pushed.[85] This has had major adverse economic ramifications, as court-based solutions cost much more than effective social regulation.

The AJP's neglect of and non-engagement with political parties and actors, political processes, and the legislature further contributed to the eventual ineffectiveness of the AJP reforms. Exclusion of political actors and representative bodies translated into inattention to many areas of recurrent disputes and legal contestations that actually require wide consultations and consensus-building, fresh multi-stakeholder policy thinking, and meaningful legislation. The replacement of rigorous participatory debate with executive decree meant that there were no political champions and social ownership even for the legislation that did take place under the AJP "outcome areas."[86] Prescribed as they solely were by the AJP-anointed technocrats/legal experts, once it emerged that there was neither any public awareness of the reforms, nor any ownership among important stakeholders, the politically unrepresentative and unaccountable technocrats/legal experts conveniently washed their hands of the problem. Instead, they ingenuously blamed their failure on the general apathy of Pakistani citizens. The

[85] For instance, more effective drafting and stringent implementation of urban zoning and construction regulations could preclude many resource-consuming court contestations.

[86] This applies in particular to the AJP-led reforms listed above in the outcome categories "Legislative and Procedural Reform"; "Administrative Law Reform"; "Other Institutional Reform"; and "Police Reform."

AJP's flawed non-participatory strategy also directly contributed to the premature demise of its initiatives in the "outcome area" of "legal empowerment." These citizen-based reform initiatives faded away due to the internal strife between government departments and lack of awareness and ownership among the public at large as well as vital additional stakeholders.[87]

"Court efficiency enhancement" and "delay reduction" were the underlying imperatives of most of the AJP's "outcome areas." They were also pursued through specific policy actions under the separate outcome area of "delay reduction." The evidence on the ground indicates, however, that these reforms were largely a failure, even though the ADB formally reported "full compliance" by the relevant governmental agencies and departments with most of these policy actions. This is fundamentally because while the AJP was obsessed with expediting case disposals in courts, it neglected the phenomenon of fast-escalating litigation in the country, and also disregarded the various mechanisms for diverting and reducing the courts' workloads discussed above. The official 10-year data for the past decade from the Supreme Court, the four High Courts, and the provincial courts of first instance, clearly shows that the AJP reforms did not produce any marked improvement in court efficiencies, despite the bulk of the AJP funds having been allocated to court capacity enhancement (both infrastructure and human) and to reforming court processes and systems. Case disposal data across these courts show that, barring a few exceptional years in some courts, the gaps between case disposals and case pendency were constantly expanding. In other words, growing case disposals have not caught up with the increasing volume of newly initiated cases and, therefore, case backlogs are piling up.

Further evidence for the lack of impact of the AJP's "delay reduction" reforms is provided by the official case pendency data recently provided by the Supreme Court, which are presented below in Table 5.1. These statistics do not include the case pendency data for the special courts and administrative tribunals. However, we are told of an equally high pendency of cases there.[88]

Interestingly, the main explanation offered by the Supreme Court for the accumulation of this huge backlog is the inadequate budgetary

[87] See Murtaza and Siddique, *Retrospective Report*.

[88] See the Supreme Court of Pakistan's "National Judicial Policy 2009," www.supremecourt.gov.pk/njp2009/njp2009.pdf.

Table 5.1: *Statistics on backlog of cases in Pakistani courts (2009)*

Superior judiciary	No. of pending cases	Subordinate judiciary	No. of pending cases
Supreme Court	19,055	The Punjab	1,225,879
Federal Shariat Court	2,092	Sindh	144,942
Lahore High Court	84,704	NWFP	187,441
Sindh High Court	18,571	Baluchistan	7,664
Peshawar High Court	10,363		
Baluchistan High Court	4,160		
Total pending cases	138,945		1,565,926

allocation for the judiciary, and hence the paucity of judges.[89] This is an unpersuasive claim given the AJP's primary focus on enhancing judicial capacity and its efficiency in disposing of cases. Once again, one is persuaded to challenge the judicial assumption that the mere enhancement of the number of judges can adequately address these huge backlogs, while neglecting the various additional factors contributing to excessive litigation and the rising number of "case backlogs."

The existing number of judges in Pakistan's appellate courts, at the time of writing, supports this challenge. All combined, the websites of the Pakistani appellate courts revealed (as of November 5, 2009, immediately after the introduction of the National Judicial Policy 2009) a total strength of eighteen Supreme Court of Pakistan judges;[90] five Federal Shariat Court judges;[91] twenty-four Lahore High Court Judges;[92] nineteen Sindh High Court judges;[93] thirteen Peshawar High Court judges;[94] and a solitary judge in the Baluchistan High Court.[95] At their stated strengths (while conceding that these courts were under-strength at the

[89] National Judicial Policy 2009.
[90] Supreme Court of Pakistan website at www.supremecourt.gov.pk/web/.
[91] Federal Shariat Court website at www.federalshariatcourt.gov.pk.
[92] Lahore High Court website at www.lhc.gov.pk/.
[93] Sindh High Court website at www.sindhhighcourt.gov.pk/.
[94] Peshawar High Court website at www.peshawarhighcourt.gov.pk/.
[95] At the time of writing, the Baluchistan High Court was in a complete state of overhaul, as all of its incumbent judges had been declared ineligible to hold office for taking an oath under General Pervez Musharraf after his declaration of emergency in 2007. It had only one newly appointed judge who was also its Chief Justice, and additional appointments were underway.

time of writing and new appointments were in the offing), if we divide the number of pending cases in the various appellate courts (as provided in the data above) by the available number of judges in those courts, we get the following number of cases per judge: 1,058 cases for every judge of the Supreme Court; 418 cases for every judge of the Federal Shariat Court; 3,529 cases for every judge of the Lahore High Court; 977 cases for every judge of the Sindh High Court; 797 cases for every judge of the Peshawar High Court; and 4,160 cases for the sole judge of the Baluchistan High Court (numbers rounded to the nearest digit).

If one were to assume that these courts were actually operating at their fully sanctioned capacity (which according to their official websites is: seventeen, eight, sixty, forty, twenty, and eleven judges respectively), the caseload per judge obviously lightens.[96] However, the number of cases per judge at the ideal full operational capacity of these courts would still be as follows: 1,120 cases for every judge of the Supreme Court; 261 cases for every judge of the Federal Shariat Court; 1,411 cases for every judge of the Lahore High Court; 464 cases for every judge of the Sindh High Court; 518 cases for every judge of the Peshawar High Court; and 378 cases for every judge of the Baluchistan High Court (numbers rounded to the nearest digit). These of course are just the pending cases. We are assuming no new cases, even though, as discussed above, litigation is perpetually on an upward trajectory in Pakistan. Even excluding any new cases, the judges' workload is still very high. One might add that the real reasons why achieving the courts' sanctioned strengths has historically proven to be highly elusive relate to the difficulty of finding sufficient capable and willing candidates for judicial appointments, and to the controversies and tussles over the appointment process. Due to these constraints, most of these courts have seldom ever enjoyed their fully sanctioned capacities. Also, many, if not the majority, of the cases in the appellate courts are actually heard by two, three, or a higher number of judges, which further dilutes the number of available judges per case – as do recent long-drawn-out, politically controversial cases heard by larger benches of the court and even the full bench, for months on end. It is evident from this analysis that "delay reduction" is simply not achievable solely through enhanced court capacity, as asserted by the Supreme Court.

[96] Although not in the case of the Supreme Court, where the sanctioned strength is actually seventeen and hence the number of cases per judge actually goes up.

In addition to the above observations, it is also important to point out some of the institutional design and implementation issues and constraints that stemmed from the AJP's program-management structure. These had a direct bearing on the eventual diminished success of its reforms.[97] The AJP had a centralized management structure at the federal level, which led to weak ownership in the provinces. While it made financial sense to place the AJP in the federal government, confining provincial involvement in AJP management to mere representation in the National Steering Committee (NSC) and to a broad oversight role through Provincial Program Coordination Committees (PPCCs) was greatly instrumental in reducing provincial ownership in and capacity to deliver reform. This arrangement was all the more unworkable because 60 percent of the AJP loan comprised funds that were to be lent onwards to the provinces for financing reforms at the provincial level. Yet the management of the entire country-wide operation was exclusively vested in a Program Management Unit (PMU) situated in Islamabad, which simply did not have the resources, networks, outreach, or capacity to undertake the overwhelming task.[98] Provincial program management was further constrained by the absence of (although initially visualized) Provincial Program Management Units (PPMUs) and inadequate PPCC control over resources made available for technical assistance for reform.[99] Furthermore and crucially, the MoL – a federal ministry and also AJP's main executing agency – had no jurisdiction over the judiciary or the police, which were two of the main arenas/targets of the AJP reforms.[100]

A significant characteristic of the AJP was its pro-infrastructure or "brick and mortar" reform bias. This was also reflected in the underutilization of the funds actually made available for the more difficult to achieve but highly significant "soft reforms."[101] The AJP design was

[97] See Murtaza and Siddique, *Retrospective Report*.

[98] Murtaza and Siddique, *Retrospective Report*.

[99] The Government of Punjab, for instance, requested the devolution of the management control of the AJP to the provinces, but the PMU and the MoL did not agree to this request, despite ADB's endorsement of the same (Murtaza and Siddique, *Retrospective Report*).

[100] See Pakistan Constitution, the Federal and Concurrent Legislative Lists.

[101] See Murtaza and Siddique, *Retrospective Report*. The AJP provincial program loan documents stipulated that 20 percent of the total allocation must be spent on "soft" reforms and institutional capacity-building of implementation agencies, and it did not preclude additional expenditures. However, the bulk of the AJP program loan proceeds were spent on infrastructure development, while program loan spending on institutional development remained less than 5 percent (ibid.).

also deficient in providing effective mechanisms to dovetail infrastructure development with institutional development. As a result, the two occurred in isolation.[102] Throughout its life, the AJP was also majorly constrained by human resource issues. Both the MoL and the PMU were inadequately staffed and the available staff lacked meaningful ROL reform experience. To make matters worse, top PMU management frequently changed, resulting in the loss of valuable institutional memory, experience, and momentum. Project supervision was also impaired by the inability of the central supervisory mechanism of the NSC and the PPCCs to meet regularly.[103] These institutional design and implementation issues are discussed further in the following sections.

Evaluating ADB's evaluation of AJP

In view of the above critique, it would be instructive to now compare and contrast ADB's own posthumous review of the AJP. The "official voice" conveys a paradoxical but ultimately very different picture. First of all, it is adamant that the AJP had no design issues at all. ADB's 2009 Program Completion Report (the "ADB Report") states that: "The AJP's design and formulation were and remain relevant. The program design was well-grounded in the broader political economy context pertaining to the law and justice sector."[104] While conceding that an accurate evaluation of the AJP's impact is difficult due to the paucity of data, it declares the "performance of its consultants" to be "satisfactory," and the performances of the "borrower and executing agency" as "partly satisfactory."[105] The ADB Report is also much more generous when describing its own performance. It reports the AJP's overall "effectiveness in achieving outcomes"; declares the AJP to be "effective in improving access to justice"; and regards AJP's reforms vis-à-vis the judiciary to be "largely successful."[106]

[102] For instance, it had no mechanism to ensure that the requirement of spending not less than 20 percent of the released funds on institutional development was adhered to. As it turned out, it was not (Murtaza and Siddique, *Retrospective Report*).

[103] Murtaza and Siddique, *Retrospective Report*.

[104] See ADB, "Program Completion Report," p. 2.

[105] ADB, "Program Completion Report," p. 14.

[106] ADB, "Program Completion Report," p. 15. According to ADB: "[J]udicial efficiency improved and there is greater transparency and accountability in the delivery of the judiciary services" (ibid.). It states, however, that the AJP was "less successful and less effective in improving the police" (ibid., p. 16).

In terms of the AJP's "efficiency," the ADB Report employs two methods of evaluation: "an integrated program framework," which combines judicial and police reforms and capacity-building efforts; and a "policy loans framework," which exclusively highlights the judicial reform dimension of the AJP (most of the AJP loans were directed toward the judiciary).[107] Under the "integrated program framework," ADB regards AJP as "less efficient" in achieving outcomes and the sustainability of the AJP reforms to be "less likely." Further, it regards the AJP's contribution to "institutional development" as "moderate," but its "impact" as "significant."[108] However, if one examines ADB's evaluation of the AJP under the "policy loans framework" (which emphasizes AJP's impact on judicial reforms), it paints a rosy picture and declares the AJP to be "successful."[109] Not surprisingly, ADB proposes the "policy loans framework" as the more appropriate framework for assessing the AJP's impact.[110] In short, the ADB Report is a study in paradoxes as well as a testimony to the art of master draftsmanship – it

[107] ADB, "Program Completion Report," p. 18.

[108] ADB, "Program Completion Report," pp. 16–17. ADB's justification for declaring that the AJP had significant impact is as follows: "The AJP made a significant impact in terms of introducing socio economic changes. The AJP helped accelerate reforms in the judiciary and the police, notwithstanding that additional time is needed to develop stronger ownership and a clearer agenda for police reforms. The AJP strengthened the credibility of reformers, as most recently evidenced by the reinstatement of the Chief Justice of Pakistan based on widespread support. The AJP fostered policy learning and built capacity for policy formulation. It improved the public debate on policy development in the sector. With respect to the judiciary, the AJP resulted in improved judicial efficiency and improvements in gender mainstreaming in the sector" (ADB, "Program Completion Report," p. 17). The reference to the AJP having any link with the "Lawyers' Movement" or the complex set of factors leading to the restoration of the Chief Justice of the Supreme Court is highly tenuous at best and opportunistic at worst. Under the "integrated program framework," ADB's evaluation of the AJP is as follows: "Based on this integrated program framework, AJP is rated as *Partly Successful* (Appendix 7). This rating can be clarified as follows: Judicial reforms: *Successful* • Police reforms: *Less/Partly Successful* • Institutional Capacity Building through TA Loan: *Unsuccessful* (less than 17% of the loan was utilized despite significant needs for capacity building and a 3-year extension of this loan)" (ibid.).

[109] ADB, "Program Completion Report," p. 18.

[110] According to ADB: "[E]valuation of a complex program such as the AJP should be undertaken within a broader political economy context … Assessing the AJP under the policy loans' outcomes reflects strong performance by the judiciary in a number of areas … which is accounted for by various positive outcomes, including adoption of new laws, creating new policy-making bodies, strengthening judicial efficiency, improving predictability and consistency between fiscal and human resource allocation and requirements for the judiciary and the police, and improving judicial accountability and transparency" (ADB, "Program Completion Report," p. 18).

concedes the AJP's various shortcomings and failures, and yet still manages to declare it to be successful.

Reform with democratic deficit: critiques from a comparative perspective

Having examined ADB's own assessment of the AJP, I shall now focus in the following sections on various additional perspectives on the justice sector reform experience in Pakistan in general and the AJP experience in particular by reproducing the feedback from the three aforementioned "unofficial voices." These perspectives emerge from the scant available secondary literature on the AJP (the "comparative review voice"); the views of informed external observers of the AJP (the "informed outsiders' voice"); and observations of the AJP insiders (the "insiders' voice").

Available comparative evaluations of the AJP (the "comparative review voice") contend that it carried the excess baggage of outdated ideas and strategies from bygone reform eras. They are critical, in particular, of the AJP's strategy of reliance on "policy conditionality" as an inducement for reform, in what they contend is widely considered globally as the "post-conditionality" era of justice sector reform.[111] Scathingly critical about the International Financial Institutions' (IFIs) historical use of "policy conditionality" tools to achieve compliance, they declare that the burdening of "poor, security fraught and fiscally dependent countries with external policy prescriptions has a long provenance, both in application and critical commentary."[112] They attribute the ineffectiveness of such approaches in creating incentive structures for loan-recipient governments to implement policy reforms (which they would not otherwise implement) to a "deeply technocratic bias"; and also to a neglect of the "political economy factor or the oversight of the issues of 'power, politics and democracy.'"[113] Quite damningly, this critique equates "policy conditionality"-based ROL approaches with the pursuit of "the 'executive shortcut,' the hatching of reform programs in closed-door sessions with

[111] See R. Ahmad and D. Porter, "Justice Sector Reforms and Policy Conditionality: Symbiosis or Mutual Denial?" in T. F. McInerney (ed.), *Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries* (Rome: IDLO, 2006), p. 61. Both authors were senior managers of the AJP through most of its life.

[112] Ahmad and Porter, "Justice Sector Reforms," p. 61.

[113] Ahmad and Porter, "Justice Sector Reforms," p. 61.

the executive wing of governments largely without parliamentary scrutiny."[114] In short, the AJP is described by such evaluations as a "structural adjustment program, recast as a policy-based lending program."[115]

At the same time, the comparative review voice also contends that the AJP did attempt to avoid the well-recognized difficulties associated with past structural adjustment programs and "policy conditionality"-based approaches.[116] Highlighted, for instance, is the AJP's avowed commitment to engage not just with the judiciary, but also the other two organs of government, despite reforms around the judiciary being its primary focus.[117] It is also suggested that the AJP had a richer reform menu and a longer time commitment than past ROL reform programs.[118] The AJP also ostensibly reflected a shift in how the concept of poverty was understood, embracing the notion of "vulnerability" rather than relying narrowly on "poverty head counts" and "minimum income levels."[119] Further, the comparative review voice finds merit in the AJP's strategy to push for enabling legislation before releasing loan tranches, in order to bring greater durability to policy commitments. The AJP, we are told, intended to only promote outcomes where there was prior policy commitment.[120] Also distinguished is the AJP's visualization of policy conditions as stimulants for indigenous debate on reform, rather than as static blueprints for policy compliance.[121] Finally, we are persuaded to take cognizance of the unprecedented provision of additional funds by the AJP in order to sustain reforms.[122]

The aforementioned facets are arguably "novel" and inarguably fascinating themes for any discussions on reform design and structure. However, the crux of the matter is whether they successfully graduated from the "avowed" to the demonstrated. The identifiers of these "novel"

[114] Ahmad and Porter, "Justice Sector Reforms," p. 61.
[115] Ahmad and Porter, "Justice Sector Reforms," p. 64.
[116] Ahmad and Porter, "Justice Sector Reforms," p. 64.
[117] Ahmad and Porter, "Justice Sector Reforms," p. 64.
[118] Ahmad and Porter, "Justice Sector Reforms," p. 63. Ahmad and Porter point out that the AJP visualized not just core judicial reforms, but also reforms in the areas of alternative dispute resolution, administrative justice, police and public safety, legal education, legal empowerment, as well as justice sector administrative reforms, other fiscal reforms, and a variety of civil society engagements with the courts, police and justice sector administration (ibid.).
[119] Ahmad and Porter, "Justice Sector Reforms," p. 63.
[120] Ahmad and Porter, "Justice Sector Reforms," p. 63.
[121] Ahmad and Porter, "Justice Sector Reforms," pp. 64–5.
[122] Ahmad and Porter, "Justice Sector Reforms," p. 65.

features themselves concede that the AJP's democratic deficit played a cardinal role in undervaluing and negating these "novel" ideas. For instance, the comparative review voice informs us that a "novel" approach of mandating enabling legislation before releasing fund tranches, in order to promote outcomes only where there was a prior policy commitment, was pursued through what is called the "cascade approach."[123] "Cascading" was premised on the assumption that laws once promulgated will enable and empower citizens, who will then employ the mechanisms, processes, and platforms afforded by a normal democratic polity to derive protections and benefits from such laws. The comparative review voice itself concedes that the AJP's assumption of a "normal polity" was misplaced, as was its naive assumption that the Pakistani citizens could develop a direct nexus with new rights-bestowing laws without the necessary interface of political representatives and processes – and also without prior AJP engagement with the political and social realities and stakeholders in the country.[124]

Another instance of "novelty" of approach remaining a novelty in theory is as follows. The comparative review voice argues that the AJP visualized its policy actions as "working hypotheses." The underlying idea was to attract focus to intended domestic dialogues on these policy actions and not to view them as stringent commands.[125] However, the "interpretative and analytical voice" and the "voice of personal experience" point out that there is little evidence that the AJP managed to actually generate participatory domestic dialogues on its policy actions. They further posit that it is difficult to imagine how this was going to be possible in the first place, considering that the AJP's governance and implementation structure ensured that its discourse remained largely restricted to cloistered consultations with certain formal counterparts in the executive and the senior judiciary and, thus, aloof from any possible engagements with other domestic dialogues and stakeholders.

Even conceding that the AJP actually learned from previous ROL experiences, that it accordingly visualized reform differently, and that it had some "novel" features, there is no getting away from the fact that it was seriously handicapped by its democratic deficit, its non-participatory approach, and the resulting court-centricity. These three vital shortcomings are discussed at length in the previous section. There is a consensus

[123] Ahmad and Porter, "Justice Sector Reforms," p. 64.
[124] Ahmad and Porter, "Justice Sector Reforms," p. 75.
[125] Ahmad and Porter, "Justice Sector Reforms," p. 74.

on this diagnosis among the interpretative and analytical voice, the voice of personal experience, and even the comparative review voice. The latter is unequivocal that the AJP "was designed through an unusually severe case of 'executive short-cut' that was substantially in tension with the conditions of normal polity," which led to several levels of hostility among the executive, the judiciary, and the newly elected parliaments.[126] As a result, "the lesson, not surprisingly, is that an executive short-cut approach will most likely undermine a reform process regardless of how well these reforms articulate a 'reasonable consensus' of opinion."[127]

The voice of personal experience would further argue that by speedily churning out new legislation through the "executive short cut," the AJP was misled by an unrealistic expectation that success in the next and much more arduous phase of reforms – which would entail the actual embedding of these laws in the legal and normative framework of the country, as well as their consequent successful invocation by the citizens – would necessarily follow. In fact, governmental compliance with the initial set of easily achievable policy conditions actually contributed to a misplaced euphoria and lack of rigor that persisted even when policy compliance started degenerating into a mere "box-ticking" exercise. A close comparison of the AJPs' own "policy action compliance reports," discussed above in this chapter, with the actual on-the-ground and longer-term impact of the policies formally complied with, provides considerable evidence of such degeneration, as well as the scant institutional notice of the same. All three voices also concur that the AJP's extra funding mechanisms for sustaining reform in the long term were ineffectual. The explanation offered for this outcome by the comparative review voice is not much different from the explanations provided by the interpretative and analytical voice and voice of personal experience. It is essentially that the AJP fatally overestimated the capacity of a historically disempowered citizenry to invoke these opportunities, just as it underestimated the formidable obstacles presented by bureaucratic inertia, political gamesmanship, and the weak precedents of informed collective action in a democratically denuded polity.

On the other hand, an important distinction between the points of departure of the interpretative and analytical voice and comparative review voice is that the former is far less convinced that the AJP's design had the potential to bring about something altogether more promising.

[126] Ahmad and Porter, "Justice Sector Reforms," p. 73.
[127] Ahmad and Porter, "Justice Sector Reforms," pp. 73–4.

Quite apart from its democratic deficit, the former asserts that the AJP's very design and implementation plans were in contradiction with the idea of wider participatory engagements and lacked a commitment to generating such dialogues. Furthermore, although the comparative review voice highlights some interesting facets of the AJP and extends arguments about their intended purpose – particularly those put forward as intended catalysts for domestic dialogue, negotiation, and consensus-building around certain reform ideas – the interpretative and analytical voice and also the voice of personal experience argue that mere intent does not really matter, as ultimately nothing of the sort actually transpired. In other words, because of the AJP's failure in recognizing the social-democratic preconditions for reform, and its inability to create domestic demand for and stakes in the same, its "policy conditionalities" were reduced to technocratic reform menus, no matter how "novel."

In a context where the official ROL reform agenda adheres to limited engagement with diverse local aspirations and expectations; where ever-looming deadlines preclude the opportunity for necessary research, deeper comprehension, and careful designing; where the reform effort is burdened with unrealistic oversized ambitions; and where there is an over-reliance on formal institutions for delivery, what is presented as comprehensive soon ceases to be so. In such milieus, "cookie-cutter" and "pre-packaged" ROL programs are routinely favored over more nuanced strategic interventions. There is also the well-recognized risk of elite capture.[128] Although the aforesaid is meant to be a generic description of such ROL programs, it fits the AJP very well.

Reform without context: a critique from without

Underestimation of and lack of engagement with local contextual realities emerges as the primary critique of the AJP in the secondary literature discussed above. Interviews with several respected and seasoned external observers and commentators on Pakistan's experience with international donor-led justice sector reform – the "informed outsiders' voice" – emphatically agreed that the most significant shortcoming of the AJP and other donor-led reform projects of the past decade was the neglect, lack of engagement with, and, at times, complete ignorance of the all-important socio-political, cultural, and economic context of

[128] See E. Jensen, "Rule of Law and Peace-Building: A Modest Proposal," The Asia Foundation, *Weekly Insight and Features from Asia*, June 25, 2010.

Pakistan. The informed outsiders' voice highlighted and discussed several aspects of this ostensible neglect – the court-centricity of such reform and its exclusion of vital stakeholders; episodes of "transplantation" of alien and unworkable reform ideas; lack of appreciation of the Pakistani judiciary's several constraints as a custodian of reform, given its particular history and vested institutional interests; misplaced focus on problematic symptoms rather than underlying societal causes; and an overemphasis on the adjudicative modes of dispute resolution and formal normative frameworks to the exclusion of various other alternatives and normative systems. As to the court-centricity of reforms, the informed outsiders' voice specifically critiqued the obsession with speed and efficiency. It highlighted the consequent disregard of demand-side variables and the actual aspirations and problems of end-users – who mandate an understanding of and engagement with underlying societal and cultural causes for recurrent and entrenched disputes – which are not remediable through mere enhancement of the speed and efficiency of courts. The informed outsiders' voice elaborated at length on what it regarded as the neglect of various important areas of social regulation, as well as the short horizons of the reform approaches that excluded an appreciation of the political, social, and cultural while looking at the legal.[129] The remaining section elaborates on this extensive feedback from the external observers and commentators.

A court-centric approach on the part of the ROL reforms in Pakistan in general and the AJP in particular was a theme that received extensive critical attention. The informed outsiders' voice underlined the crucial roles and vital stakes of many important players and stakeholders in the justice sector, such as academics, lawyers, policy experts, media, civil society organizations, NGOs, human rights organizations, and citizen groups.[130] A persistent line of criticism maintained that these stakeholders were inadequately consulted during the design stage of the ROL projects and insufficiently involved during their implementation – with the consequent omission of important and divergent perspectives on

[129] Justice sector reform projects are invariably referred to in these discussions as ROL reforms or ROL reform projects, as ROL was the most commonly employed term by various international multilateral and bilateral donor programs during 1998–2010. It was also the term of choice in local discourses on the justice sector.

[130] Interview with Mr. Abid Hassan Minto, Senior Advocate Supreme Court of Pakistan and Former President of the Supreme Court Bar Association, April 2010; and interview with Dr. Ali Cheema, Associate Professor and Chair of the Department of Economics, LUMS, May 2010.

justice other than those of the judges. This epitomized the erroneous strategy of placing the entire onus for reform on the very institution that was sought to be reformed. At the same time, lack of involvement and communication with multiple stakeholders created an atmosphere of doubt and mistrust toward reform – in certain instances, it generated opposition to and obstacles for the same.[131] Furthermore, such a non-participatory and non-transparent process created a conducive environment for "transplantation" of reforms that may have worked in a different context, but could not be successful in Pakistan.[132] Thus, invariably, the ROL reform projects fell far short of a nuanced appreciation of the local context, thereby failing to tailor reform design and interventions accordingly. They mostly opted instead for a "one size fits all" approach.[133]

Another recurrent assessment was that it was unwise to place entire trust in the judiciary to reform itself. According to the informed outsiders' voice, by entrusting the judges with the primary responsibility of reforming the judiciary, the ROL reforms evinced their ignorance or chose to ignore the historical political character as well as the various structural and sociological limitations of the Pakistani judiciary.[134] The commentators highlighted the controversial and at times politically partisan role of the Pakistani appellate judiciary at important historical junctures.[135] They emphasized how it had often sided with undemocratic regimes or political pressure groups and thus given in to the imperatives of the dictatorial governments of the day, at the cost of the interests of democracy and citizens' fundamental rights.[136] They argued that it had seldom, if ever, shown any great intrinsic commitment to meaningful institutional or legal reform.[137] They posited that quite apart from having

[131] Interview with Mr. Hussain Naqi, Senior Journalist and National Coordinator, Human Rights Commission of Pakistan (HRCP), Lahore, April 2010.

[132] Interview with Dr. Faisal Bari, Associate Professor of Economics and Director Open Society Institute (OSI), New York, May 2010.

[133] Interview with Dr. Faisal Bari. Also, interview with Khawaja Haris Ahmad, Senior Advocate Supreme Court of Pakistan and Advocate General Punjab, Lahore, April 2010.

[134] Interviews with Dr. Muhammad Waseem, Professor of Political Science, LUMS, April 2010; Dr. Rasul Bakhsh Rais, Professor of Political Science, LUMS, April 2010; and Dr. Ali Cheema, May 2010.

[135] Ibid. Also, interviews with Mr. I. A. Rehman, Senior Journalist and Secretary-General, HRCP, Lahore, April 2010; and Khawaja Haris Ahmad, May 2010.

[136] Ibid. In addition, interview with Mr. Khaled Ahmed, Senior Journalist, Lahore, April 2010.

[137] Interview with Mr. Khaled Ahmed.

a clear bent toward the political centers of power, the Pakistani judiciary had traditionally been resistant to modernization and institutional reform – due to its entrenched interests, self-preservation instincts, and institutional conservatism.[138] They complained that the lower judiciary had often failed to protect individual citizen rights, especially those of vulnerable groups, backing off when faced with the pressures of different political and economic power mafias.[139] Given all this, the informed outsiders' voice seriously questioned the ROL reform projects' unstinting confidence in the judiciary as being amenable to any meaningful reform stemming solely from the judges, especially given that it was primarily through the stimuli of physical capacity building and brick and mortar upgradations.[140] The informed outsiders' voice specifically pointed out the acute need for reforms in the areas of judicial appointment, performance evaluation, and accountability within the existing constitutional framework – none of which the ROL reform projects had broached.[141] The same voice also found it disappointing that the quality of justice dimension was given short shrift due to the ROL projects' single-minded pursuit of quantitative output and operational efficiency.[142] At the same time, these projects showed no appreciation of the fact that judicial reforms were a chimera without concomitant political, institutional, and social reforms.[143]

The informed outsiders' voice also chose another mode to explain what it considered to be a fatal flaw of the ROL projects. It described their approach as characterized by a myopic over-focus on the mere symptoms of societal problems rather than the underlying causes.[144] Some commentators emphasized that in socio-politico-economic contexts like Pakistan, divisive poverty and inequality – gauged by wealth/income differences, inclusion/exclusion due to caste, gender, accent, religion, geography, etc. – are deeply entrenched phenomena of great longevity. These gulfs and divisions have been worsening with the passage of time, debilitating the growth and progress of society as a cohesive unit and at times endangering its very survival – terrorism, breakdown of law and order, escalating crime, etc. are all

[138] Interviews with Mr. Hussain Naqi, April 2010; Mr. I. A. Rehman, April 2010; Dr. Muhammad Waseem, April 2010; and Khawaja Haris Ahmad, April 2010.
[139] Interview with Dr. Muhammad Waseem, April 2010; interview with Dr. Rasul Bakhsh Rais, April 2010; and interview with Dr. Ali Cheema, May 2010.
[140] Ibid. [141] Ibid. [142] Ibid. [143] Ibid.
[144] Interviews with Dr. Faisal Bari, May 2010; Dr. Rasul Bakhsh Rais, April 2010; Mr. I. A. Rehman, April 2010; and Mr. Hussain Naqi, April 2010.

manifestations of this.[145] The fatal flaw, they posited, is that in such a context, the various ROL responses since 1998, epitomized in initiatives such as the AJP, emanated from a very status quo mindset.[146] They attempted to tackle some manifestations of the core problems, but never the core problems themselves. For instance, they focused on improving prisons, policing, and the conviction process, but did not actually probe why crime occurred in the first place, its variable nature, and the several complex reasons for its rapid growth. The same also held true, they maintained, for other regulatory reform initiatives of this era, such as privatization, deregulation, etc., which were the result of the 1980s Washington Consensus thinking. These regulatory initiatives did not address the actual problems confronting developing countries, and often ended up exacerbating them. As a result, the real reasons for the worsening discord and increase in number and violence of disputes in Pakistani society remained unanalyzed and remediless.[147]

Other commentators chose to describe the problem as essentially that of the omission of the political from the ostensibly legal and judicial – finding it remarkable that the ROL reforms focused on legal and judicial change without taking due cognizance of relevant and connected political structures, factors, imperatives, and motivations. The legal/judicial and the political, they argued, have to be seen in conjunction with each other; one cannot reform the former without reforming the latter.[148] However, the ROL reforms made an artificial distinction between the same, equating justice and the justice sector with the purely legal and judicial, and even in some cases solely with the judicial. Political parties, the legislature, workers' unions, other political and social collectives, and citizens' rights groups were largely not approached. The inattention to the legislature was especially telling considering that many of the access to justice issues emerge from antiquated laws and/or gaps in the legal and regulatory frameworks. Effective ROL reforms could have only transpired through effective collaboration of the legislature, the judiciary, and the executive – not just through a dalliance with the judiciary.[149]

[145] Ibid. [146] Ibid. [147] Ibid.

[148] Interviews with Dr. Muhammad Waseem, April 2010; Dr. Rasul Bakhsh Rais, April 2010; Mr. Abid Hassan Minto, April 2010; Dr. Faisal Bari, May 2010; and Dr. Ali Cheema, April 2010.

[149] Ibid.

Many commentators felt that the problem was also one of scope. In other words, the ROL reforms generally lacked the vision and commitment for longer-term investments in local social and political capacity building. Actual and sustainable progress in terms of structural and cultural improvements in the justice sector, in the quality of judicial output, and in bringing about more resilient safeguards for fundamental rights and a meaningful democracy were always going to depend on building the indigenous political, social, and intellectual capacity to support and entrench reform.[150] Several indispensible steps toward these goals obligated longer-term visions and investments, such steps being: structural and qualitative improvements in the spheres of legal education and research, the legal profession, legislative capacity, policy analysis, and policy-making capacity; and the capacity building of social groups and citizens' organizations, political institutions and processes, the media, the intelligentsia, and other public awareness and opinion-making institutions. So too did the steady and progressive empowerment of various disempowered sections of the Pakistani citizenry in order to enhance robust, participatory, and pluralist politics, to generate an effective and coordinated domestic demand for justice, and to establish wide-ranging societal checks on the quality of justice. However, the ROL reforms only offered short-term visions, transitory commitments, and provisional investments.[151]

A fascination for speed and efficiency over and above everything else was bound to result in several casualties of such neglect. One significant category of casualties comprised several important areas of state regulation. The external observers discussed various crucial aspects of Pakistani public life that were conspicuous for the complete or partial absence of the state.[152] They highlighted, for instance: the fast-altering and largely unregulated land boundaries, as well as the various additional problems posed by massive and unregulated urbanization; the rapidly transforming ownership and usage of land in the rural areas; the absence of systematic and scientific land titling; the changing nature of criminality, together with the increasingly blurred lines between the civil and criminal laws; the several lacunae and gaps in the law of evidence, especially in view of

[150] Interviews with Dr. Faisal Bari, May 2010; and Dr. Ali Cheema, May 2010.
[151] Ibid.
[152] Interviews with Mr. Zulfiqar Hameed, Senior Police Officer, June 2010; Dr. Ali Cheema, May 2010; Dr. Faisal Bari, May 2010; Mr. Abid Hassan Minto, April 2010; and Khawaja Haris Ahmad, April 2010.

the changing nature of crime as well as the new generation of violence spawned by terrorism; the various holes in the legal regimes governing labor rights and collective action frameworks; and a vast regulatory vacuum for aspects of social life that were previously governed by local and special laws with magisterial powers to take cognizance.[153] These legislative and regulatory gaps, the irregular governmental endeavors toward cataloguing and enumeration in order to capture changing social realities and newly emerging issues, and the persistence of several outdated colonial administrative mechanisms were, according to the informed outsiders' voice, some of the main contributors to Pakistani societal disputes. However, this plethora of issues could no longer be adjudicated or could only be inadequately adjudicated in the courts due to absent, repealed, flawed, and/or outdated laws and regulations. And yet the ROL reform agenda essentially excluded these important questions from its ambit.[154]

The informed outsiders' voice claims that the other major casualties of the ROL reforms' monomania with "speed" and "efficiency" were the actual end-users of the justice system. Many commentators stressed that the ROL reforms overemphasized the supply side of justice, while overlooking the integral demand side.[155] The fact that access to justice is influenced, and often obstructed, by power structures and exploitative practices in society obviously necessitated a determination of who actually accesses the courts and who does not, or even more importantly, who cannot. Various socio-economic relationships of domination in terms of economic class, caste, *biradari*, political group, gender, religion, ethnicity, geography, and other sociological constructs were highly germane to any determination of differential levels of access to justice.[156] However, the ROL reforms in the past decade or so in particular largely focused on merely the cost and time constraints influencing access to courts – a narrow and limited frame of inquiry while observing the much larger and complex phenomenon of access to justice.[157]

Additional prominent areas of omission by the ROL reforms were the important social and cultural dimensions of justice and the possibilities

[153] Ibid. [154] Ibid.

[155] Interviews with Dr. Rasul Bakhsh Rais, April 2010; Dr. Faisal Bari, May 2010; Dr. Ali Cheema, May 2010; and Mr. Abid Hassan Minto, April 2010.

[156] Ibid. Also, interviews with Mr. Hussain Naqi, April 2010; and Mr. I. A. Rehman, April 2010.

[157] Ibid.

and opportunities presented by multiple local normative frameworks and societal practices. Quite a few external observers were of the view that the ROL reform agenda did not take sufficient cognizance of the prevalent alienation of vast sections of Pakistani society from the formal justice system.[158] General and legal illiteracy, the elevated culture of officialdom, information asymmetries, weak accountability mechanisms, uninformed and non-instructive discourses, and the ubiquitous opaqueness of governmental and political processes all essentially contribute to hiding the realm of the formal from the public gaze. In important ways, the judiciary also subscribes to and preserves this exclusionary culture and aloof governance system in a context where the realms of the political, the social, and the institutional – other than the army, the executive, the civil bureaucracy, and the judiciary – are fairly underdeveloped. One can, therefore, identify many different entrenched as well as newly emerging ideologies of legitimacy in the Pakistani society – such as the various manifestations of popular Islam, popular culture and customary practices, etc. – a logical outcome of the official culture of exclusion and alienation. They enshrine popular aspirations, goals, and norms that are often quite different from the official ones. They exist parallel to and at times in conflict with the official ethos of legitimacy, as perpetuated by the courts.[159]

Unlike India, in Pakistan, social movements have not made much headway in bridging this gap between the official and the popular. Thus, there are basic issues with the legitimacy of several laws in the popular imagination. Many laws and official norms do not have the respect and allegiance of vast sections of society – both religious and secular – for a whole spectrum of doubts and discontentment. At times, this galvanizes alternatives that are retrogressive and obscurantist. However, on other occasions, these alternative normative frameworks, which commanded the people's respect, also present valuable opportunities for dialogue, consensus-building, partnerships, and a more socially relevant and effective rule of law. These fundamental realities of the local social and political milieu were, however, neglected in court-centric ROL approaches – they remained aloof to the existence of multiple fissures between prevalent social norms and practices and the official normative framework, and also to the room for dialogue and collaboration implicit in the same.

[158] Interviews with Dr. Ali Cheema, May 2010; Dr. Muhammad Waseem, April 2010; Dr. Rasul Bakhsh Rais, April 2010; and Dr. Faisal Bari, May 2010.

[159] Ibid.

By putting a premium on litigation as the preferred mode of dispute resolution, the ROL reforms overlooked other potentially cost- and time-efficient alternatives. These alternatives exist, the commentators articulated, in the realm of effective legal and social regulation, as well as the various acceptable local and customary forms and modes of dispute resolution prevalent in different communities – these could potentially preclude the need as well as the excuse, in selected areas, for expensive and time-consuming litigation, help reduce the workload of the courts, and provide the citizens with cheaper, more intelligible, socially recognizable, less inconvenient, and more rapid options for resolving disputes.[160]

According to the informed outsiders' voice, even within the narrower ambit of improving court efficiency and performance, the ROL reforms overlooked the crucial background and underlying reasons for social contestations and ever-increasing litigation – AJP was a typical example of such an approach.[161] It also did not seem to occur to the reformers that even if speedy legal decisions were achieved, this on its own would be insufficient if litigation was increasing at an ever-greater rate.[162] They did not probe why excessive litigation took place and in which particular areas. They never investigated the identity of the stakeholders in such litigation, nor did they seek to understand the plight of those whose legitimate claims never made it to the courts.[163] Since the vital questions about if and why litigation was on the rise were never really asked, needless to say, there was hardly any engagement with the factors that logically contribute to the rising number of disputes and escalating litigation. These include the aforementioned phenomenon of archaic and outdated laws, the lack of correlation or linkages between such laws and the social and economic formations and developments in society, the fact that even new legislation largely relies on earlier laws for its form, content, and intent, and the jarring paucity of original and socially engaged thinking on how new laws should respond to the changing issues and challenges in society. It seems to have escaped the reformers' notice that the huge gaps in the Pakistani regime of regulations, rights, and remedies were only occasionally and arbitrarily

[160] Interviews with Dr. Ali Cheema, May 2010; Dr. Rasul Bakhsh Rais, April 2010; and Mr. Abid Hassan Minto, April 2010.
[161] Interviews with Dr. Ali Cheema, May 2010; Dr. Faisal Bari, May 2010; and Mr. Abid Hassan Minto, April 2010.
[162] Ibid. [163] Ibid.

filled by civil negotiations or co-opted state interventions, rather than socially conscious legislation,[164]

The factors and constraints emphasized by the informed outsiders' voice also resonate in contemporary international law and development literature. Various analyses in the latter also argue that contextually aloof or ignorant as well as shorter-term visions of ROL reform invariably face insurmountable problems, if not eventual oblivion.[165] This, the informed outsiders' voice stressed, is particularly true for post-colonial contexts, where weak state structures and nascent civil societies grapple with the myriad problems of struggling democratic ethos and institutions. Further challenges to the creation of an enabling environment for reform are posed by an entrenched and over-intrusive centralized bureaucracy and army, low levels of education and human capacity, a destabilizing geo-political situation, and the various other well-documented issues faced by less developed economies and societies. According to the same voice, the "transplantation" in such contexts of the donors' predetermined notions of what is good reform – a "one size fits all" approach – often leads to the imposition of ideas and structures that may have little or no chance of succeeding, as the milieus from which such ready-made reform ideas were borrowed are very different.

Contemporary international law and development literature suggests that even a context-specific reform approach may be embroiled in the larger tussle between very different notions of ROL. It may encounter difficult choices between whether to: prioritize a certain set of rights that eventually leads to the development of more efficient markets and optimal economic regulation (for example, contract and property rights and various laws intended to bring about greater efficiency in a country's project development, natural resource excavation, banking, credit, stock market, and bankruptcy regimes); or pursue an altogether different set of rights that push forward a distinct democratic project laying greater premium on the rights of labor, landless peasants, indigenous people, and other disadvantaged groups, as well as environmental protection. Such a tussle may be further exacerbated in situations where the reform

[164] Ibid. See also interviews with Mr. Hussain Naqi, April 2010; Mr. I. A. Rehman, April 2010; Khawaja Haris Ahmad, April 2010; and Mr. Khaled Ahmed, April 2010.

[165] A typical critique is that such reforms tend to be piecemeal rather than comprehensive. See R. E. Kranton and A. V. Swamy, "The Hazards of Piecemeal Reform: British Civil Courts and the Credit Market in Colonial India," *Journal of Development Economics*, 58(1) (1999), 1–24. Piecemeal reforms are easy to design, convenient to manage, and less expensive to support, but also much less likely to generate any change.

agenda pushed by the donors has little appreciation of the nature of local demand for reform, as well as the high risk of local elite capture.[166]

Reform without structure: a critique from within

As mentioned previously, although various government and donor-led justice sector reform programs and interventions were introduced in Pakistan between 1998 and 2010, they were eclipsed in terms of their ambit and scale by the AJP.[167] This section, therefore, focuses on several internal evaluations of the design, implementation, and impact of the AJP by the actual reform designers, reform program officers, and local policy consultants who were centrally involved in the AJP. Thus, it captures another very important voice – the "insiders' voice," i.e. the perspectives and insights of those directly and closely involved with the AJP – who were asked to reflect and speak candidly about the AJP experience. As opposed to examining the larger contextual factors discussed in the previous section, the insiders' voice highlights the various background historical, internal institutional, and specific cultural and design aspects of the AJP which fell within the domain of these policy practitioners' direct and regular observation and experience.

The insiders' voice actually questioned the controversial genesis of the AJP – wondering aloud if it was fundamentally committed to any reform, or whether it predominantly served to fulfill the acute budgetary support needs of the Pakistani Government at the time, which were met through loan extensions under the rubric of ostensible justice reforms. The AJP was formally introduced in Pakistan in 2001, against the backdrop of the steadily deteriorating quality, access, and efficiency of the justice sector and police services, and ostensibly due to the widespread public perception for the need for improvement.[168] However, views differ as to whether the AJP was primarily visualized and negotiated under this imperative. According to one of the interviewees, the AJP essentially arrived in the wake of the Pakistani Government's demand for simple budgetary support. Since the AJP was not backed by a genuine

[166] See, generally, the various perspectives on this in D. M. Trubek and A. Santos (eds.), *The New Law and Economic Development* (Cambridge University Press, 2008).

[167] See Murtaza and Siddique, *Retrospective Report*, pp. 12–15.

[168] See *Report and Recommendations of the President of the Board of Directors: Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program* (Manilla: ADB, 2001).

underlying commitment to actual reform and the ADB did not possess the requisite experience and capacity to undertake a project of this scale, the AJP was essentially driven by the narrow loan disbursal imperatives of an international multilateral lender.[169] A contrary and more generous view is that while it is factual that the Pakistani Government was exclusively interested in simple budgetary support (basically for recruiting more judges), certain ADB professionals with a commitment to deeper reforms made a concerted effort to successfully persuade the government to utilize this funding opportunity to make a positive difference in some historically neglected areas of the Pakistani justice sector.[170] ADB insiders admit, however, that the organization had little past experience of undertaking such large-scale justice sector reform, and that it undertook the project by relying overwhelmingly on external technical support and expertise.[171] This lack of credible institutional experience in large-scale ROL reforms, and the limited possibilities of wider domestic stakeholder input due to the absence of a democratically elected government at the time the AJP was launched, posed many subsequent challenges. The AJP was preceded by an ADB study that gave detailed recommendations as to the direction and content of reforms, many of which were incorporated in the AJP as policy conditionalities.[172] Intended initially to focus purely on the judiciary, the AJP was only subsequently broadened to include certain reforms geared toward the police and other services.

Senior ex-staff members of the AJP candidly admit that introduced as it was during General Pervez Musharraf's regime, the development of the

[169] Interview with Mr. Raza Hayat Harraj, Former Law Minister, Government of Pakistan, Islamabad, June 2010.

[170] Interview with Mr. Hamid Sharif, Office of the General Counsel (OGC), ADB, Manila, May 2010. As one of the senior most professionals in the ADB's OGC, Mr. Hamid Sharif was one of the principal founders and architects of the AJP. According to Mr. Sharif, given the historical focus of multilateral lenders to engage purely in infrastructure development programs, it was a major achievement to persuade the ADB to invest in the reform of the justice sector in Pakistan. According to him, contrary to popular perceptions, ADB's and the Pakistani Government's interest in this area emerged long before the events of 9/11. This actually occurred in 1997, when ADB was involved in the upgradation of the country's incipient corporate regulatory body – the Corporate Law Authority (CLA). Resisting new government demands for simple budgetary support for recruiting more judges, the government and the ADB leadership were persuaded to look at the justice sector in its entirety, and to focus specifically on the difficult but much-needed soft reforms (ibid.).

[171] Interview with Mr. Hamid Sharif, May 2010.

[172] See "Integrated Report, Pakistan Legal and Judicial Reform Project" (The Asia Foundation, September 1999).

AJP's vision and design were not preceded or even subsequently informed by any extensive participatory engagements with local stakeholders in the justice sector. This caused the AJP to be burdened with very weak democratic credentials, which remained a persistent critique of the reform program.[173] They offer several different reasons as to why the AJP was not or could not become more participatory and inclusive. One strong insider critique attributes the AJP's political and societal non-engagement to a general multilateral donor preference for dealing with government bureaucracies rather than politicians and societal organizations, i.e. their preference for "executive short-cuts" – due both to the perceived relative ease of engagement and an erroneous technocratic visualization of legal reform as an apolitical phenomenon. While dealing with an autocratic regime, the temptation as well as the opportunity for using "executive short-cuts" was even higher. As a result, and quite damagingly for the AJP's future, it had no real political ownership from within the country, nor any public support or stake. Furthermore, this disengagement with society and the political actors and an overreliance on certain executive and judicial partners translated into a very lopsided, supply-focused tilt to the reform package.[174] Another insider critique points out the inherent tensions between multilateral donor-lending imperatives of quick loan disbursement – without serious evaluation and oversight of the level of its eventual impact – and the highly necessary but complex and time-consuming socio-political contextual assessments of the nature of reforms actually required by the loan recipients, in order to enhance their impact and sustainability. According to this view, given the acute budgetary constraints faced by the government and its very narrow imperative of generating the much-needed funds through borrowing, the multilateral lenders like ADB enjoyed a very dominant negotiating position vis-à-vis Pakistan's cash-strapped military government. As a result, the multilateral lender's vision prevailed at the cost of what was necessary from the perspective of the loan recipients. And as a consequence, the vitally required constituency-building and

[173] AJP's democratic deficit is admitted even by those insider voices who otherwise presented the most robust justifications for its vision and design. See interview with Mr. Hamid Sharif, May 2010. According to him, one of the big lessons from the AJP is that good governance reforms cannot neglect the vital demand dimension. Much more could have been done toward an effective strategy to create greater participation in reform thinking and hence greater ownership in reform (ibid.).

[174] Interviews with Mr. Muhammad Sarwar Khan, Senior Legal Governance and Reform Advisor, ADB, Islamabad, Pakistan, April 2010; and Mr. Hamid Sharif, May 2010.

demand generation for reform, the enhancement of the capacity of public accountability of reform, and an effective communication strategy for reform were equally neglected.[175]

The insiders' voice also argued that a project like the AJP was doomed to failure from its very inception. The rationale offered for this dismal hypothesis was that, given Pakistan's federal structure, the AJP's ultimate success depended on close cooperation between the federal and provincial governments – and yet such cooperation was neither readily available nor systematically or rigorously sought due to the unitary state ethos of the Musharraf Government. This factor majorly contributed to the failure of difficult institutional reforms at the provincial and local levels. Musharraf's highly centralized rule was neither in a position to forge nor committed to forging the requisite collaboration between the federal and provincial governments.[176] Furthermore, the Musharraf Government's centralized and executive-driven reform agenda was going to be unsustainable once his rule ended and elected political governments came to power.[177] In addition to this, the insiders' voice points out that the AJP's centralized and non-participatory approach also contributed to a lack of coordination between the different donors, and between the donors and the government. This in turn led to improvident overlap, wasteful duplication, and missed opportunities for synergizing and collectively making an impact.[178] This lack of coordination also manifested itself at yet

[175] Interview with Mr. Waqas ul Hassan, Former Program Officer, ADB, Islamabad, Pakistan, April 2010. Others also emphasize the adverse impact of disbursement-centric donor approaches. See interview with Raza Ahmad, Former Program Officer, ADB, Islamabad, Pakistan, April 2010.

[176] Interview with Mr. Raza Ahmad, April 2010. See also interview with Mr. Waqas ul Hassan, April 2010, who further emphasized that the AJP had a weak management structure and did not visualize and plan necessary and robust provincial involvement in the reform process.

[177] Interview with Mr. Raza Ahmad, April 2010. Others agreed with this view. See interview with Mr. Muhammad Sarwar Khan, April 2010. Mr. Khan was also of the view that the AJP's design was not in line with the constitutional structure of the country. The AJP focused on the federal government, whereas the justice sector is a provincial subject under the Pakistani constitution. The lack of buy-in from the provinces seriously debilitated the AJP throughout its life (ibid.).

[178] Interview with Mr. Saif Anjum, Former Team Leader ADB TA 4922: Sub Project Public Safety/Prosecution Reforms, Lahore, Pakistan, April 2010. According to Mr. Anjum, coordination failures resulted in a herd mentality among donors while picking and choosing areas of reform, and also a lack of empirical learning and regular communication which were requisite to gauge what was being underemphasized or neglected. While various reform efforts since 1998 were relatively successful in bringing about infrastructure development, and a certain amount of capacity building in the

another level: in the various political rivalries and battles that ensued among the AJP's several local implementation agencies. These entanglements were also highly corrosive for the long-term sustainability of the reform process.[179]

Like the informed outsiders' voice, the insiders' voice also emphasized the AJP's inadequate appreciation of and scant engagement with local contextual features, structures, and challenges. Quite a few interviewees were of the view that the AJP's lack of cognizance of the Pakistani structural and political realities, as well as its local institutional rivalries and constituencies, while designing its list of reforms was bound to be a fatal mistake.[180] This contextual naivety was coupled with a design rigidity, which did not allow for modifications and improvizations in the design in view of the ground-level realities and challenges that emerged during implementation.[181] Other internal observers, however, presented the counter explanation that the AJP was not as narrowly

bureaucracy as well as certain sections of society, thus enabling them to engage in a critical, analytical, and reform-oriented discourse, these efforts were largely unsuccessful in bringing about any significant and sustainable soft reforms at the institutional and cultural levels. Others also supported this critique of coordination failure: see interview with Mr. Hamid Sharif, May 2010. According to Mr. Sharif, the AJP was let down by the bilateral donors who (due to inertia and also a certain amount of turf management) never really stepped forward to invest in the demand-side of reform, for which they are mandated and are more capable of doing than multilateral lenders (ibid.).

[179] Interview with Mr. Saif Anjum, April 2010. According to Mr. Anjum, the reform efforts were not carefully pitched and calibrated to steer clear of and manage local conflicts, tensions, and the confusing jurisdictional overlaps of the ministries and departments of the federal and provincial governments, as well as other institutions in the justice sector. As a result, considerable time, effort, and funds were wasted due to the frequent attrition and delays that were caused by turf management, lack of cohesion and consensus, and poor overall coordination (ibid.).

[180] Interview with Mr. Raza Ahmad, April 2010. According to Mr. Ahmad, the AJP's design was not sufficiently attuned to local needs and constraints, especially the resistance of entrenched local elites to reform and the disempowered status of vast sections of local population. This was, according to him, because the AJP's notion of "good governance" was wedded to the Washington-Consensus thinking on this area, and its preferred methods for desirable reform. In addition, at stages that required careful assessment and engagement, the AJP tended to be rushed in its approach (ibid.).

[181] Interview with Mr. Muhammad Sarwar Khan, April 2010. According to Mr. Khan, the AJP evinced little appreciation that justice sector reform is ultimately political, and hence potentially messy. Undertaking such reforms required a commitment to a longer time horizon, the ability to engage with diverse players and complex situations, a commitment to build indigenous constituencies for reform, and the flexibility to amend and adapt according to the constraints faced, while remaining true to the underlying goals and ethos of reform. The AJP was supposed to have a 15-year horizon and yet ADB walked away from the challenge long before that (ibid.).

imagined as it eventually became and was subsequently perceived to be. This narrowness, they argued, transpired due to the government's resistance to more wide-scale reform, and also the paucity of local stakeholders with sufficient experience and expertise to own and meaningfully promote reforms in diverse sectors. As a result, the AJP's actual achievements were limited and diffused.[182] According to them, the fact that the AJP loan was subsequently inflated to its eventual size is partial testimony to the fact that the ADB realized the vastness and complexity of the justice sector and sincerely desired extensive coverage.[183] At the same

[182] Interview with Mr. Hamid Sharif, May 2010. Mr. Sharif offers the explanation that in the design process leading to the AJP, a vast arena for reforms, including areas such as legal education, etc., was visualized. However, the difficulties in finding credible and interested governmental counterparts for implementation, together with the political instability at the time due to the change of government resulting from Musharraf's coup in 1999, got in the way of this more dynamic vision. However, he insists that a typical World Bank project-like approach for purely infrastructure development was resisted in favor of a sectoral reform approach, and the creation of an enabling environment for enhanced justice delivery before the extension of big project loans. According to him, even the reform of the appellate courts was on the original agenda, but various political events and the lack of constitutional legitimacy of the Musharraf regime made that a highly politically sensitive matter. Hence, the focus came to rest exclusively on the district judiciary, which in any event was primarily responsible for service delivery to the ordinary citizen. The AJP designers hoped that reforms in this arena would also ultimately travel upwards and create pressure for reforms in the appellate judiciary. ADB agreed that such a vast and complex reform agenda should have a 10- to 15-year horizon. Furthermore, given the lack of local capacity to push reforms, it was also decided that rather than extend a standard program loan that tracks performance against investment, the AJP should actually track performance against actual reforms in order to ensure delivery. It was only because there was no local stakeholder confidence in the judiciary's ability to successfully run the program (due to its lack of capacity and inexperience in the areas of budgetary work, negotiations with the bureaucracy, program management, etc., and also the possibility of financial mismanagement) that the program was vested in the Federal Ministry of Law & Justice (MoL). Due to a recognition also of the low institutional capacity at the MoL, a $20 million TA Loan and $1 million TA grant were extended to create the missing capacity (ibid.).

[183] Interview with Mr. Hamid Sharif, May 2010. According to Mr. Sharif, the AJP was originally visualized between the $80 to $100 million benchmarks. Two factors changed this. The first was the strong demand from the government for budgetary support at that time (which ADB would have in any case extended in some other manner, if not through the AJP). The second factor was the recalculation of the realistic expenditure needed to bring about any meaningful attempts at reforming a sector as vast and complex as justice. The eventual figure of $350 million was reached as a result. At that stage, ADB also engaged with the ongoing national reconstruction project by the National Reconstruction Bureau (NRB). The bureau had important areas of overlap with the AJP in the criminal justice sector. This additional factor contributed to the

time, they suggest that such critique of the AJP is on occasion paradoxical. This is because while being blamed for being too narrow, it is at the same time criticized intermittently for being over-adorned, somewhat like a "Christmas tree" – i.e. it had too many policy conditions and related policy actions.[184]

It is remarkable how frequently the internal operators of the AJP expressed the view that it was deeply influenced by Washington Consensus ideas. This, according to them, resulted in special areas of focus at the cost of other more important ones – particularly in the pursuit of efficiency at the cost of larger equity and distributive justice goals.[185] Emerging in the context of the Asian financial crisis of the 1990s, some of the internal observers were of the opinion that the AJP was deeply influenced by the new paradigm shift of the development discourse from "growth" to "governance."[186] A related feature was that infrastructure reform was pursued as the paramount goal, while soft reforms never

inflation of the loan amount, as the important and complex area of police reforms was also included within the ambit of the AJP (ibid.).

[184] Interview with Mr. Hamid Sharif, May 2010. According to Mr. Sharif, the multiplicity of policy conditions and actions was deliberate. Fewer conditions, according to him, would have created vagueness and lack of direction. Further, he maintains that the AJP was not just narrowly focused on the courts, but also on the larger goal of creating an enabling environment for justice. Hence, ADB wanted to make interventions at several levels. Since the Pakistani Government was amenable to the idea at the time, the ADB thinking was that this was a great opportunity to make many changes. In hindsight, the large number of policy actions may be regarded as over ambitious. ADB was pragmatically of the view that even if they achieved 20 percent of their vast agenda, it would be a great achievement (ibid.).

[185] Interview with Mr. Muhammad Sarwar Khan, April 2010. According to Mr. Khan, as a result, an inherent tension between a focus on efficiency and a stated commitment to equity (in the AJP's own policy documents) constantly characterized the AJP, and the actual balance was always on the side of the former. He was of the view that while some headway was made on the efficiency-focused reforms, the equity-focused reforms were fewer in number and fell mostly by the wayside (ibid.). See also interview with Mr. Raza Ahmad, April 2010.

[186] Interview with Mr. Raza Ahmad, April 2010. According to Mr. Ahmad, even though the AJP emerged from an Asian multilateral donor, ADB had a big buy-in in these new imported ideas of reform, sold as it was to the Washington Consensus ideas and ideologies. Global events such as the economic shock, 9/11, the nuclear weapons race in South Asia, and heightened border tensions between India and Pakistan also had an impact on the eventual AJP design – the idea was to ensure that it was "politically neutral." This contributed to the absence of reality checks about the ground realities in Pakistan, the acute neglect of constituency building for reform, a centrist focus that ignored the provinces, and the usual donor rush to implement reforms as quickly as possible (ibid.).

really progressed.[187] Others, however, insist upon the value of pragmatism, and claim that even in hindsight the efficiency enhancement reforms were the most achievable ones and also showed the most positive results – if anything, they should have been pursued with even greater zeal.[188]

Being insiders, the interviewees also provided very valuable details about various facets of what they regarded as AJP's weak operational structure, low managerial and administrative capacity, complexity of implementation framework, overreliance on technocrats, and inadequate stakeholder oversight and accountability of reform.

AJP insiders also identified several issues with the AJP's operational structure, and its management and administration. As mentioned earlier in this chapter, the AJP was placed under the auspices of the MoL – its main executing agency. The MoL managed the AJP through a Program Management Unit (PMU). However, according to the insiders' voice, the

[187] Interview with Mr. Raza Ahmad, April 2010. According to Mr. Ahmad, the bulk of the AJP funds (the $330 million program loan) were directed toward infrastructure development. The remainder (the $20 million Technical Assistance) that was necessary to ensure that reforms were more wide-ranging than mere infrastructure development and also more effective and nuanced, was delayed by the government (even though ADB wanted this amount to be used to create better capacity and effectiveness of implementation prior to the extension of the $330 million). Although some engagements with the legal bars, civil society organizations, etc. were enshrined in the AJP design, they were never seriously engaged with (ibid.). It is confirmed in conversations with the Chief Justice of Pakistan when the AJP was launched that the judicial leadership at that time visualized the AJP as essentially an infrastructure development program. See interview with Justice (Retd.) Shiekh Riaz Ahmad, Lahore, August 2010.

[188] Interview with Mr. Hamid Sharif, May 2010. Mr. Sharif insists that in hindsight it was a mistake not to further bolster what he thinks turned out to be one of the strongest components of the AJP, i.e. the technical assistance for court efficiency and case management. According to him, these interventions showed very promising results, especially in those areas and pilot districts where the judicial leadership owned and diligently pursued these reforms. However, he admits that the lawyers remained largely in the background, even though their involvement was necessary to make case management reforms sustainable. Attempts at bar reform, according to him, also did not make much headway due to the constantly changing bar leadership, the stand-off between the bars and the Supreme Court after the imposition of Musharraf's martial law, and the highly politicized nature of the bars. However, he elaborates that the AJP was instrumental in the introduction of bar exams, albeit they have not achieved the qualitative levels that were hoped for. Furthermore, at least on paper, the AJP did achieve much by way of new laws, policies, and regulations in the areas of administrative law, consumer laws, freedom of information, procedural laws, and public accountability, which contributed to and are bound to have a longer-term impact on the creation of an enabling environment for reform (ibid.).

AJP's program management was riddled with various problems that adversely impacted on a strict adherence to the prescribed formula for the utilization and smooth flow of funds for effective reform.[189] This organizational arrangement is described by some as the biggest "stumbling block" to reforms, as the MoL did not have sufficient influence with the other ministries and the civil bureaucracy in order to ensure reform implementation.[190] The fact that a judge rather than a civil servant headed the MoL further contributed to its lack of linkages with and outreach to other parts of the Pakistani Government that were intransigently run by the civil bureaucracy.[191] Additionally, it came to light that it was very difficult to attract any seasoned civil servants to the MoL and the PMU who could bring valuable experience of project management to the table – an expertise wholly lacking at the MoL and the judiciary.[192]

A related contributory factor, according to the insiders' voice, concerned the inappropriate government choices for the key positions in the reform implementation agencies. The responsible officers at the various crucial departments and institutions entrusted to push reforms did not always possess the requisite commitment, aptitude, and qualifications for the task. As a result, they at times became hurdles for the reform process rather than acting as its champions. The frequent transfers of key officers also caused a disruption in momentum and continuity.[193] Others suggested that the centralized modus of reform, reflected by the housing of the AJP in the MoL, was ill equipped to tackle the entrenched elite opposition and bureaucratic inertia to any ideas of reform and accountability – as evidenced by the international experience that central agencies invariably fail to deliver reforms, whereas decentralized attempts at innovation have been more successful.[194] In addition to this, the subsequent relocation of the PMU from the MoL and thereby its establishment as a separate entity made the reform impetus weaker even at the central locus of reform: the PMU, they opine, surely ought to have remained embedded in the MoL.[195] It was not just the MoL, it turns out, that was debilitated by the dearth of requisite experience in project management

[189] See Murtaza and Siddique, *Retrospective Report*.
[190] Interview with Mr. Hamid Sharif, May 2010.
[191] Interview with Mr. Hamid Sharif, May 2010.
[192] Interview with Mr. Hamid Sharif, May 2010.
[193] Interview with Mr. Muhammad Sarwar Khan, April 2010.
[194] Interview with Mr. Raza Ahmad, April 2010. Mr. Ahmad cited the examples of successful decentralized innovations and reforms in India and Canada.
[195] Interview with Mr. Raza Ahmad, April 2010.

and serious inadequacies in terms of skills, workforce, research and analysis capacity, implementation outreach, etc. The situation was not dissimilar even at the other central institutions that were allocated the responsibility to push reforms – such as the Law & Justice Commission of Pakistan and the National Judicial Policy Making Committee.[196]

The shortage of reform experience and expertise on part of the AJP's local partners and the AJP's lack of engagement with various other vital domestic stakeholders led, according to the insiders' voice, to an over-reliance on the services of foreign policy consultants for reform implementation ideas and solutions.[197] However, the experiential inadequacies of the donor organization also became evident when ADB attempted to fill local gaps with foreign "experts" – their own "expertise" at times being highly questionable.[198] Some of the commentators, however, forwarded the defense that the AJP eventually made a genuine attempt to avoid the model of "transplantation" by relying on local experts – wary as it also was of the shortcomings of imported expertise, which had emerged in the early stages of the AJP. Furthermore, this pursuit of local consultants was also driven by the AJP's commitment to further develop such local expertise and experience.[199] Others, however, were quite skeptical of this claim. They argued instead that the introduction of the local "experts" was essentially meant to provide "local" legitimacy to the pursuit of the real donor agenda – i.e. to push reforms whose progress was measured through the successful disbursement of loans rather than any actual meaningful and sustainable impact. This "agenda" and "ethos," they argued, found ready implementers in many of the locally hired "experts."[200] The unobstructed pursuit of this loan disbursement agenda, according to them, was also made possible due to the weak governmental oversight of the reform solutions presented by the foreign and local "experts." A rigorous interface of the donors/reform drivers with their government counterparts was a vital prerequisite for any consequential reforms. This, however, was largely missing since most of

[196] Interview with Mr. Raza Ahmad, April 2010. See also interview with Mr. Waqas ul Hassan, April 2010.
[197] Interviews with Mr. Raza Ahmad, April 2010; and Mr. Waqas ul Hassan, April 2010.
[198] Interview with Mr. Raza Ahmad, April 2010. Mr. Ahmad stated that the inexperience and low levels of expertise of the ADB's own foreign staff of experts was a perpetual problem. See also interview with Mr. Muhammad Sarwar Khan, April 2010.
[199] Interview with Mr. Hamid Sharif, May 2010.
[200] Interview with Mr. Raza Ahmad, April 2010. See also interview with Syed Ali Murtaza, May 2010.

the more astute government officers were actually hired by the ADB as its local consultants. Any possibilities of a critical evaluation, guidance, and scrutiny of reform by the Pakistani Government were, therefore, acutely handicapped.[201]

Apart from discussing various structural, organizational, and managerial constraints, the insiders' voice also drew attention to the complexity of the AJP's reform decision-matrix and the unworkable nature of its operational framework – with as many as twenty-nine government agencies entrusted with the operation and implementation of the AJP.[202] This made the reform process highly cumbersome and ineffective at various levels. The already convoluted arrangement was further compounded by the aforementioned domination of the AJP by the federal implementing agencies and the consequent lack of provincial ownership of and support for the same.[203] AJP's ineffective communication strategy also had shambolic consequences, as it resulted in making the reforms largely invisible to the public at the best of times, and fairly doubtful and untrustworthy in the worst-case scenarios.[204]

[201] Interview with Mr. Waqas ul Hassan, April 2010.

[202] The federal implementation agencies (or partnering agencies) were the Federal Ombudsman, the Higher Education Commission, the Federal Judicial Academy, the Law & Justice Commission of Pakistan, and the Ministry of Interior. The provincial implementing agencies were the provincial departments of Law, Home, Finance, Police, the provincial Public Safety & Police Complaints Commission, the provincial Ombudsman, and the provincial High Courts. This made the monitoring and evaluation task a veritable nightmare. See interview with Mr. Rizwan Mahboob, Former AJP ADTA and Monitoring & Evaluation Expert, May 2010. The Annual Performance Reviews (APRs) of the AJP did point out some of these issues, and suggested various mechanisms for greater monitoring and evaluation, public accountability, and public communication of the reform agenda and process. However, the formal understandings between the Pakistani Government and ADB to address the same were never really taken seriously by either party. The implementing agencies themselves did not fully comprehend the AJP, let alone share a commitment and ability to implement it. See interview with Mr. Muhammad Sarwar Khan, April 2010. Others supported this view: see interview with Mr. Waqas ul Hassan, April 2010. According to Mr. Hassan, there was insufficient performance evaluation and accountability of the team working on the AJP, and hence performance standards could vary vastly from person to person. This also resulted in inadequate and weak work plans, as well as good thinking not necessarily translating into actionable points (ibid.).

[203] Interview with Mr. Zubair Khursheed Bhatti, Former Program Officer, ADB, Islamabad, Pakistan, April 2010. See also interview with Mr. Raza Ahmad, April 2010.

[204] Ibid. In addition, see interview with Mr. Waqas ul Hassan, April 2010. Mr. Hassan was of the view that only limited attempts were made toward successfully securing a larger political and public buy-in for the AJP through a communication and wider participation strategy. This neglect contributed to a suspicion of, hostility to, and resistance

It transpires from the analysis conducted in this chapter that the AJP was not only predominantly focused on the courts, but also highly reliant on the judicial leadership for the successful implementation of its reforms. Bearing this in mind, it is highly significant to note that the "insiders' voice" reported a very difficult and turbulent experience with the judicial leadership entrusted with the successful implementation of the reform – quite often it became the main obstacle.[205] At the same time, while the judiciary and the courts were largely the focal areas of the AJP, some commentators found it egregious that its list of reforms basically omitted or underemphasized any meaningful engagement with significant issues of corruption, lack of meritocracy, weak accountability, and poor management within the judiciary.[206]

So what is the legacy of the AJP? One of its main architects and a senior ADB official, Mr. Hamid Sharif, insists that:

> On the positive side, the AJP has left a legacy of various structures, ideas and concepts that are now part of the reform debate and that were absent prior to the AJP. Recent judicial conferences and the general justice sector reform discourse in Pakistan shows that the AJP ideas have both percolated up to the appellate judiciary and to other sections of society, NGOs

against reform efforts. Reforms were widely seen to be introduced in the mold of the accusatory, critical, and punitive, rather than as opportunities and benefits. Others agreed with this evaluation: see interview with Mr. Muhammad Sarwar Khan, April 2010.

[205] Interviews with Mr. Zubair Khursheed Bhatti, April 2010; Mr. Raza Ahmad, April 2010; and Syed Ali Murtaza, May 2010. According to Mr. Sharif, a major challenge faced by the AJP was that of a suspicious judiciary, elements of which perceived the AJP as an attempt to undermine the state. Some headway was made toward building trust with the judiciary, but General Pervez Musharraf's coup and subsequent upheavals in the government and judiciary (such as Musharraf's unconstitutional removal of several appellate court judges in 2007) meant a constantly shifting cast of characters and their respective shortcomings and prejudices. This seriously impeded sustained reform dialogue and progress. In short, the AJP found very few champions for reform among the judiciary (interview with Mr. Hamid Sharif, May 2010). Others shared this view: they report that, in the context of judicial reforms, there was sustained judicial resistance to the same and, barring some exceptions, a defensive attitude displayed by the High Courts. There existed an overall sense of a lack of ownership in reform. The district judiciary also felt the same and, furthermore, a paucity of genuine concern for them by the appellate judiciary. See interview with Mr. Waqas ul Hassan, April 2010.

[206] Interview with Mr. Saif Anjum, April 2010. This, according to Mr. Anjum, was quite remarkable given that all available local public perception polls as well as international public perception and public transparency evaluation reports point out corruption and lack of transparency/accountability as the main problems in the Pakistani judicial system.

> etc. Though often criticized for ignoring context, by expanding the ambit of the term "justice," the AJP actually did attempt to incorporate the political-economy considerations vital for successful reform in Pakistan. The AJP provided and still provides leverage for the kind of deeper institutional reforms that donors normally do not undertake and that the civil society has historically found very difficult to achieve on its own through street protests. The message for them is to constructively utilize the space created by the AJP and push forward its positives.[207]

While agreeing with the various points of criticism directed at the AJP (discussed above), Mr. Hamid Sharif expressed his skepticism about any signs of popular pressure and civil society activism leading to any wholesale improvements in the Pakistani justice sector. Therefore, he felt that rather than making the AJP the butt of all kinds of criticisms, the players in the justice sector needed to build and improve on the AJP's legacy.[208] In his view, in the ultimate analysis, the AJP was a "partially successful project."[209] Others interviewed, however, adhered to the view that, while ambitious in its vision, the AJP was unsuccessful in releasing the stranglehold of entrenched anti-reform power elites in the country, as well as in denting the parochialism and inertia that permeates important areas of the justice sector.[210]

[207] Interview with Mr. Hamid Sharif, May 2010. Others also agree that an enabling discourse has been created, although they ascribe a much less significant level of success to the AJP. See interview with Waqas ul Hassan, April 2010. Mr. Hassan was of the view that in hindsight the AJP's primary achievement was that at least it highlighted the justice sector as an independent and important area of reform, rescuing it from its historical obscurity as a subset of other reform areas. However, he added that the reform efforts of the past decade, and particularly those of the AJP, met with limited success.

[208] Interview with Mr. Hamid Sharif, May 2010. According to Mr. Sharif, disinformation, lack of information, an ineffective communication and media strategy, an irresponsible and sensationalist press, as well as the general growing opposition to General Musharraf's regime (which was also directed at projects introduced during his tenure) also played a significant role in eroding public trust in and support for the AJP. He further added that ADB members of staff are not used to such hostile feedback, as they are generally trained to run infrastructure projects, which are less contentious and complex than ROL reform. As a result, they were unsure how to handle all the hostility directed toward the AJP, and hence they also did not deal with it very well. He was also of the view that unfair criticism can have the adverse outcome of pushing donors back into their traditional molds of limited reform agendas.

[209] Interview with Mr. Hamid Sharif, May 2010.

[210] Other AJP insiders also said that the AJP did come up with some positive changes: see interview with Mr. Raza Ahmad, April 2010. Mr. Ahmad is of the view that since 1947 no serious justice sector reform endeavor had ever been undertaken in Pakistan prior to the AJP – a period characterized by post-colonial apparatuses perpetuating colonial notions and forms of governance. He emphasized that while acknowledging the AJP's

So what is the AJP's legacy? To my mind, and in view of the analysis conducted in this chapter, it is the very "structures, ideas, and concepts" left behind by the AJP that are highly problematic and, in many instances, deeply damaging. They constitute a bequest of narrow technocratic analytical paradigms and a heritage of deeply decontextualized reform approaches, and create a precedent for solely entrusting reform in a non-participatory and aloof "club" – members of which are not only the exclusive objects of what ought to be a much further-reaching reform, but are often themselves the biggest impediments in the path of meaningful change.

Conclusions

At several important levels, the unofficial voices collectively lend support to the critical evaluation of the AJP conducted in this chapter. In other words, there is wide and deep affirmation of the AJP's several dominant failings at the substantive and structural/process levels. At the substantive level, there is much convergence and commonality in my evaluation of the AJP and other donor-driven reform programs, and the perspectives communicated by the three "unofficial voices," in particular along the following lines of criticism. First, the ROL reform interventions in Pakistan over the past decade, and most prominently the AJP, substantively focused on the efficiency enhancement of court-based dispute resolutions, ignoring the actual quality of justice emerging from the courts. Second, these interventions largely ignored context and the reasons for underlying disputes and resulting contestations in courts. Instead, they visualized court contestations in terms of the institution, disposal, and pendency numbers. Third, even in terms of choosing reform avenues, these ROL interventions adopted a court-centric

many failures, one also has to look at the Pakistani elite's strong opposition to any ideas of reform. Given this difficult context, the AJP was successful early on, as it signed up to certain policy shifts and law reforms. These first generation reforms were the result of overnight executive decrees. However, subsequent reform efforts largely failed, as they were unable to make any institutional changes to address the local political economy of rent seeking. Furthermore, they visualized too many policy actions and implementing actors and underestimated the high transaction cost and politics of reform. The fact that the AJP remained a centralized project meant that it never succeeded in denting the power base of the forces of inertia. It is the same story with the judiciary and not much percolated down to the provincial High Courts, let alone the district judiciary, and the judicial leadership also remains arrested by inertia. Mr. Ahmad, however, finds ADB's own evaluation of its success as less than reliable.

approach. Courts, judges, and legal practitioners were accorded primacy over other equally important players/avenues in the justice sector, such as citizen groups, NGOs, human rights groups, academics, policy experts, media, political parties, and legislative bodies. Consequently, there emerged a very narrow outlook not only of what the justice sector meant, but also of its multi-tiered problems, together with the spectrum of possible solutions.

At the structural/process level as well, there is much convergence and commonality between my critique of the AJP and other ROL programs, and the other voices captured in this chapter – examples of which are as follows. First, the reform process under the AJP and other donor-driven reform projects in Pakistan was, and continues to be, essentially determined and controlled by the limited, technocratic, and parochial institutional and group perspectives of the excusive reform "club." Second, the neglect of the non-court/legal profession dimensions and players of ROL reform also meant that there was, and continues to be, scant demand, awareness, transparency, accountability, and stakeholder interest vis-à-vis these reform interventions in the larger society, which in turn contributes to their lack of success. Third, by giving overwhelming primacy to courts as the terrain for reform and judges and lawyers as the instruments of reform, these ROL reform interventions largely neglected alternative modes of dispute resolution, mediation, and case diversions. These could have made justice more accessible to the citizens and also lessened the burden on courts. Even where effective social regulation made more sense, court-based adjudication was preferred. Ultimately, such preference sets resulted in not just conflating the issues that could have been more effectively resolved out of court, but in major economic ramifications, since court-based solutions cost much more than social regulation. Finally, the neglect of political parties and the legislature in this manner of ROL reform has meant that many areas actually requiring meaningful legal reform remain untackled, and there was and still is negligible political and social will, support, and championship for reform.

Having stated the above, one is fully cognizant of the difficult political and institutional environment in which the AJP was introduced, and also of the various compromises on design, content, and focus that it had to make, or chose to make. However, even if the vision was more vibrant than reality, the AJP policy conditions neither "cascaded" into the vital follow-up areas of reform, nor did they serve as "working hypotheses" for reform deliberations and consensus building. Instead, in various instances, they turned out to be precisely what they ostensibly meant to

avoid, i.e. cookie-cutter, executive short-cut supported, court-centric, and efficiency obsessed. These policy conditions, on which the release of successive tranches of loans/grant hinged, unfortunately lent themselves to a "box ticking" exercise. The various interviews with external observers and AJP insiders reveal that the technocratic domination that characterized the AJP's design stage continued throughout its life.[211] However, the deeper damage lies not only in the realm of what the AJP set out to do and did not achieve, or in the domain of what it never set out to achieve in the first place: it also lies in its larger legacy. This indeed is the theme of the following chapter.

[211] The AJP policy actions were the outcome of design choices made by consultants hired by the AJP. Many of these consultants were lawyers or former judges. Their views reflected the training and attitudes of these professions. Lack of meaningful debate and consultation with key stakeholders characterized the design phase of the AJP, and an acute lack of accountability characterized subsequent phases. One prominent example of this was the practice of "box ticking" – the AJP Implementing Agencies unquestioningly accepted documents produced by the aforementioned consultants that claimed to formally comply with the required policy conditions, and these documents were then accepted by ADB as proof of compliance. In certain cases, the policy conditions were too radical or vague even for "box ticking." They were then rephrased and reworded in order to achieve compliance. See Murtaza and Siddique, *Retrospective Report*.

6

Reform nirvanas and reality checks: justice sector reform in Pakistan in the twenty-first century and the monopoly of the "experts"

Focus and methodology

The previous chapter evaluated the nature and impact of Pakistan's reform experience in the past decade. Against that backdrop, this chapter has several additional aspirations. First, it undertakes to visualize the reform discourse and process as they are currently placed. Second, in many ways this chapter is specifically about the donors and judges – further concentrating the spotlight on the complex dynamics of the actual players dominating the Pakistani reform discourse and process. Third, it supplements the review of the available literature, statistical insights, and documented debates in the previous chapter with a different analytical and methodological framework in order to envisage the mien and modus of these dominant players. Fourth, this is the first analytical insight into relevant events, projects, and developments since the demise of the AJP and as recent as 2010. This may provide much-needed impetus for urgent attention to similar projects in the near future. Finally, the chapter provides an important comparison of the current state of the reform process with the past decade of reform, and also with what it argues ought to be the desirable nature and process of reform. There is thus an element of the prescriptive that necessarily flows from the evaluation undertaken here.

The above synopsis of this chapter's objectives may still beg the question as to the very need and appropriateness of extending up, close, and personal scrutiny to the donors and judges, as also to the suitability of any unconventional method for information gathering and analysis. In response, my argument is that the conventional evaluations of reform debates are somewhat constrained by the staid emotional and sociological neutrality and apolitical tenor of their sources of information – or the imagined neutralities and apoliticality associated with the same – and also by the straitjackets that are at times unnecessarily imposed by their real or professed objectivity. Consequently, I contend that they do not

quite capture or deliberately steer clear of certain important facets of the reform discourse and process. These include, inter alia, the overt as well as subtle institutional and individual political biases, agendas, blind spots, and idiosyncrasies that characterize important players in the reform discourse and process, and the resulting bottlenecks, attrition, and conflicts that can and do impair the same. In a milieu where the reform discourse and process are highly exclusive and undertaken in haste – both due to the limitations posed by the paucity of active players, and to the unrealistic time constraints faced by them to deliver reform – such negative outcomes and externalities are conflated and magnified.

At the same time, any acts and omissions can also have much greater reverberations. One can imagine, for instance, the ultimate debilitating impact of the flawed administrative practices obdurately followed by a funding agency; the consolidating inertia due to the cantankerous disposition and ineptitude of a judge or an administrator in a key decision-making position; the vested interests and resulting political maneuvers of several kinds of operators that hover around the larger reform debate; and the particular plight and grievances of the lowest court or governmental agency in a backwater location that acts as the first point of contact for the citizens. All of these are features or outcomes of important acts and omissions within the reform discourse and process. This chapter emphasizes these important micro-dimensions of the overall political economy, as well as the sociology of the reform discourse and process. These are often lost sight of in the more detached analyses of formal frameworks and outputs of the reform process that highlight structure, process, and key performance indicators – often forgetful of the fact that these larger phenomena are actually determined by these multiple underlying factors.

The proposed scrutiny necessarily requires a different methodology that relies on close direct observation of these multiple underlying factors. The methodological switch is further necessitated by the fact that this chapter examines events, projects, and developments spread over the immediate past, and in some cases the unfolding present. Given the immediacy of the same, insufficient time has elapsed for these events, projects, and developments to be meaningfully captured in any publicly accessible formal documentation or other primary sources, let alone any secondary literature. The fact that they are located in such temporal proximity thus compels a reliance on direct personal experience, as well as an engagement with others who possess such direct personal experience.

Reform horizons in 2010

The most recent significant development in the Pakistani justice sector reform arena was the appearance of the USAID $90 million "Strengthening Justice with Pakistan" Program (the "SJP Program") on the horizon. It was expected to become operational by early 2010. However, it was eventually shelved due to the lack of consensus on its content and operational details between USAID and the Pakistani judicial leadership, and to the conflicting perspectives on its purpose and process within USAID itself. Although predominantly driven once again by efficiency enhancement goals, the SJP Program at least promised a broader agenda of reform within the confines and limitations of its efficiency orientation. On a promising note, its Request for Proposal document (RFP) evaluated and critiqued the limitations of the ADB's AJP and showed signs of fresh intent.[1] The RFP stated that given USAID's estimation that the AJP had created openings to move forward with what it called "the next stage of rule of law development," USAID could rectify the mistakes and build on the openings.[2] The RFP recognized Pakistan's political, legal, and social complexities – albeit only in its statement of intent at that preliminary stage – and proclaimed that "sustainable impact will require a measured, flexible and demonstration-based approach that includes sequencing interventions, conducting periodic evaluations, and making adjustments as needed." This at least extended the preliminary hope of a more nuanced and flexible approach on the part of the SJP Program, as compared to the ineffectual interventions by the AJP.

The RFP broadly stated the objectives of the SJP Program in the following terms: "Strengthen the Judiciary to Achieve Progress in Judicial Efficiency, Transparency, Accessibility, Independence and Accountability."[3] However, as the RFP proceeded to elaborate on its ethos and policy priorities by linking them to its overall purpose, the "efficiency" of judicial operations, the protection of "private businesses" and "foreign investments" – and, as a result, a flourishing free "market economy" – materialized as the SJP Program's indispensible underlying aims. The following is an illustration. According to the RFP:

[1] The basic ambit and structure of the SJP is officially stated in the RFP. See USAID, RFP No. 391-09-010, "Strengthening Justice with Pakistan (SJP)," www.fbo.gov/download/f82/f825702026376a491b252180155ff40e/Pakistan_Justice_RFP_Final.pdf.

[2] USAID SJP. [3] USAID SJP.

> [A] project that supports the judiciary to achieve this objective will better protect the rights of individuals and private institutions. The judiciary's ability to protect these rights and enforce the legal and regulatory environment in Pakistan will be key to enhancing a more open environment that attracts foreign investment and in so doing, increases the efficiency of the market system, enhances sustainable economic growth and increases the standards of living for Pakistanis.[4]

Two case studies

While the SJP Program met with a premature demise, it can be safely predicted that, had it continued, its eventual course would have very likely merged with that of the dry bed left behind by the AJP. This point will be further substantiated in the following analysis, which is based, inter alia, on two case studies of very recent major reform projects in Pakistan in order to gauge the mood and direction of current donor-driven and domestic reform thinking. As it will emerge, this mood and direction continues to be majorly influenced by the AJP's fundamental ethos and priorities. These case studies rely on personal observations – from the directly engaged but not necessarily complicit vantage point of an insider – of attitudes, inflections, nuances, and individual as well as institutional choices which, it is argued, had a highly discernable bearing on the eventual outcomes of these projects.[5] This may make the methodology and tone of the following narrative appear rather unconventionally subjective – although it endeavors to be personal without being personalized. The underlying impetus, however, is to enhance our appreciation of the complex and largely inaudible as well as invisible contemporary reform discourse and process in Pakistan.

The USAID Local Court Efficiency Assessment Program (2010)

Narrowing horizons: from efficiency to micro-efficiency

In the wake of the swift demise of the SJP Program, USAID's focus during the year 2010 was on much smaller individual projects that were geared toward piecemeal reform. This has actually resulted in a further narrowing and stultifying of the reform discourse in Pakistan, which

[4] USAID SJP.

[5] The author was one of the external consultants for both of these projects.

continues to be largely driven by multilateral and bilateral donor programs and the judicial leadership of the country – although the latter is increasingly showing signs of withdrawing into a shell. Given the increasing reluctance of the judges to engage with the donors, a consequent significant development is that the donors are now bending over backward to try and tie in their reform agendas to the reform promises that are now being publicly articulated by the national judicial leadership. These reform promises most prominently appear in the National Judicial Policy (NJP) announced by the Chief Justice of the Supreme Court of Pakistan in 2009, and also at times in the occasional utterances of the National Judicial Policy Making Committee (NJPMC).[6]

The various limitations of the overbroad rhetoric of the NJP – the most prominent recent affirmative articulation on part of the Pakistani judiciary to put its house in order – were discussed earlier in this narrative.[7] Given its own open admission of the enormous problems of case delays and backlogs faced by the Pakistani judiciary, the NJP predictably underscores these as its most high-value targets for reform. With this in view, the NJP laid out various short- and medium-term strategies toward: more efficient utilization of existing resources; further capacity building of the judicial organ; the fast-track adjudication of certain important categories of cases; and greater judicial accountability of the lower court judges for a more effective response to prevalent corruption.[8] While calling for the year 2009 to be commemorated as the "year for justice at the grassroots level," the NJP also emphasized the

[6] The NJPMC is constituted under Ordinance LXXI of 2002. The Chief Justice of Pakistan is the Chairman of the Committee, and the Chief Justice of the Federal Shariat Court and the Chief Justices of the four Provincial High Courts are its other members. The Secretary, Law & Justice Commission of Pakistan is designated as the Secretary to the Committee. The NJPMC is required to coordinate and harmonize judicial policy within the court system, and to ensure its implementation in coordination with the Law & Justice Commission of Pakistan. The NJPMC is designated to perform the following functions: (i) improving the capacity and performance of the administration of justice; (ii) setting performance standards for judicial officers and persons associated with performance of judicial and quasi-judicial functions; (iii) improvement in the terms and conditions of service of judicial officers and court staff, to ensure skilled and efficient judiciary; and (iv) publication of the annual or periodic reports of the Supreme Court, Federal Shariat Court, High Courts, and courts subordinate to High Courts and Administrative Courts and Tribunals. The committee is required to publish an annual report of its activities and such other periodic or special reports relating to its functioning as it deems fit – these are submitted to the President of Pakistan. See Law & Justice Commission website at www.ljcp.gov.pk/.

[7] See National Judicial Policy 2009.

[8] National Judicial Policy 2009.

need for defending the more "vulnerable groups" in society, rather than being exclusively preoccupied with "delay reduction." However, as discussed earlier, a closer reading of the NJP reveals that it visualizes the protection of "vulnerable groups" in society to be essentially the logical outcome of a more independent, better resourced, and internally accountable judiciary, rather than as an independent objective function requiring additional focus, strategies, and special measures.[9]

Leaving aside the NJP for the moment, clear textual evidence is provided by the recently concluded USAID "Local Court Efficiency Assessment Program" (the "USAID Assessment") that the "efficiency"-fixated thinking and reform approaches dominating the last decade of reform efforts continue to confine the ambit and domain of reform interventions in Pakistan. The USAID Assessment's Request for Quotations (RFQ) openly acknowledged that while the shelved SJP Program had a much wider reform agenda, this clearly was not going to be the approach adhered to in USAID's future plans. It said:

> The SJP had a very broad statement of work (SOW) and touched on many facets of judicial reform. USAID now contemplates a much narrower activity that addresses court administration/case management with a focus on reducing court case backlog/delay. USAID Pakistan may issue several similar solicitations in the future to address possible judicial reform initiatives such as: 1) technical assistance for court administration/case management; 2) information technology equipment and electronic case management systems; 3) courthouse infrastructure rehabilitation and commodities, and 4) ROL civil society components, especially as it concerns gender issues.[10]

I contend that this latest reform approach by a major international reform funder is actually even narrower than the already narrow "efficiency"-fixated approaches discussed in the context of the AJP – I therefore describe these as the new "micro-efficiency approaches." To substantiate my contention, I would like to point out three distinctive features of this latest reform approach. First, unlike the earlier AJP and the now shelved SJP Program, this latest variant of the "efficiency"-fixated approaches to justice sector reform seems to have shed even the promising veneer of the outward rhetoric of its predecessors – which at

[9] National Judicial Policy 2009.

[10] See the USAID's "Local Court Efficiency Assessment Program" Request for Quotations (RFQ), p. 4, https://www.fbo.gov/download/c41/c41f7022efd0fd88cc6c8dfea9f49520/RFQ_No._391–10–033.pdf.

least mentioned additional avenues and goals for reform other than pure "efficiency." Second, there is a clear inclination to tie in the reform agenda to what the Pakistani judicial leadership is dictating, however narrow that may be. The anxiety to do so owes itself to the growing schism between the international donors and the resurgent post-Lawyers' Movement judiciary – a judiciary that is increasingly reluctant even to consult and engage with its historical partners in the reform process. Third, at a fundamental level, the underlying impetus for reform seems to be driven predominantly, and at times explicitly, by the "international war on terror" goals of routing Taliban militancy, religious radicalism, and Al-Qaeda, as opposed to the actual and much less sensational needs of Pakistani litigants and disputants. This comes out clearly through further analysis of this project, as well as the RFQ's overview of its statement of work, which states: "When people mistrust the justice system, the more likely they will look toward alternatives, such as strict versions of Islamic law and taking the law into their own hands," and: "[A]s one component of defeating Al Qaeda and its allies, the USG through the United States Agency for International Development (USAID) Pakistan Mission will support improved court administration/case management so as to reduce court backlog and delay."[11]

A house in disorder

Meanwhile, the aforementioned worsening disconnects between the judicial leadership and the international donors were starkly on display as USAID's attempts to woo the judicial leadership to garner its support for the "USAID Assessment" turned out to be no less than a fiasco. This is despite the close correlation between its stated goals and some of the aims stated in the NJP. An insightful glance into the judicial leadership's current characteristic avoidance of donor-driven reform projects is provided by a letter from the Law & Justice Commission of Pakistan (LJCP) to USAID. This letter was written in response to the latter's request to seek permission and support for conducting the "USAID Assessment." The LJCP wrote back stating:

> The Committee observed that the areas defined for assessment have already been identified by the NJPMC as well as by the provincial High Courts, hence rather than conducting another study [sic] let the scope of

[11] USAID RFQ, p. 3.

> the project may be [sic] revised and focused on provision of funds to strengthen infrastructure i.e. building courtrooms, residence of judges [sic] and capacity enhancement i.e. increase in number of judges, court staff, provisions of equipment etc.[12]

This snubbing by the Supreme Court essentially forced USAID to try and embark on the "USAID Assessment" by pursuing official clearances through at times surreptitious and invariably piecemeal negotiations with the provincial high courts and select district courts. The subsequent assessment was a highly fractious experience, characterized by: its frequent encounters with bureaucratic red tape; the discordances, loss of momentum, and an overwhelming lack of clarity introduced by the frequent shifting of goal posts by the donor; USAID's blurred conceptualization of the underlying purpose and scope of the project; its unfamiliarity with contextual complexities; and the over-reliance by USAID project managers on preconceived notions, their preference for cookie-cutter prescriptions, and a general state of unproductive frenzy occasioned by their unrealistic and perpetually changing project completion deadlines. The project was also frequently derailed due to the conflicting perspectives on reform emerging from within USAID and the vicious episodes of turf management among USAID, the US Embassy, the various US Consulates, and other relevant US departments. Another acutely debilitating factor was the paucity of relevant past justice sector experience on the part of many USAID project managers. As a result, the "USAID Assessment" was reduced to a very narrow evaluation of: whether the judicial officers and court staff in selected district courts received any training in court, case, and record management; whether they followed certain established management practices; and the desirable scope and nature of further requisite training in these areas – epitomizing the now prevalent "micro-efficiency" approach to justice sector reform in Pakistan.

Growing judicial insularity: brick, mortar, and independence

In view of the aforementioned snub from the Supreme Court, and reluctant to revise the focus of the "USAID Assessment" to a different (though equally narrow) objective function as communicated by the

[12] Letter dated June 23, 2010 from the Deputy Secretary of the LJCP to the Director, Democracy and Governance Office, USAID, Pakistan.

judicial leadership, USAID was very hesitant to formally re-approach the judicial leadership – even though it was necessary to seek a formal permission for its team of consultants to visit courts and interview judges for purposes of the project. As it turned out, it actually went ahead with the assessment despite the dampening feedback from the LJCP – and it never sought a formal permission from the Supreme Court of Pakistan and Lahore High Court for this purpose, proceeding with the assumption that it would manage to get an *ex post facto* ratification from the same. Thus, courts were visited and judges interviewed, but on an "unofficial" basis. In Khyber-Pakhtunkhwa (KP), the Peshawar High Court was also initially very reluctant to allow USAID consultants to visit the courts in the troubled valley of Swat. The US Counsel General's Office in Peshawar actually urged the consultants to personally approach and request the Peshawar High Court for permission to conduct the assessment in the province, as the Counsel General's office was unsure if its formal request for allowing the "USAID Assessment" would be received favorably (such attempts on its part in the past had been ineffectual).[13] Eventually, the consultants met directly with the administrative officers at the Peshawar High Court and managed to obtain the requisite permission on the basis of their personal credibility as policy advisors.[14]

The worsening split between the donors and judicial leadership was further highlighted in the consultations with the Peshawar High Court. The administrative officers at the Peshawar High Court were highly vocal

[13] Meeting with the US Counsel General, Peshawar, June 30, 2010. The Counsel General communicated that the Peshawar High Court was very upset with USAID for making officially unapproved preliminary contacts with the judiciary in Swat in order to figure out the initial work plan and logistics for the USAID Assessment. She was highly critical of USAID for not effectively communicating with and working through the US Counsel General's Office and thereby smoothing things out with the High Court in advance of the project. She further stressed that for purposes of the US Counsel General's office, the main priority areas of reform interventions were the training of judicial officers in case management and the automation of court records and processes. Furthermore, she strongly emphasized a review of the laws pertaining to the arrest and legal treatment of the detainees of the conflict in the region, in view of the US Counsel General's office's strong perception of the acute need for effective criminal trials and convictions in order to stem the growing terrorist and criminal activities in the area. She asked the consultants to strongly convey this to USAID. The fact that the local consultants were being asked to act as communicators and mediators between the US Counsel General's office and USAID divulged that the communication lines had completely broken down between the same.

[14] Meetings with Mr. Lodhi, Secretary to the Chief Justice, Peshawar High Court and Syed Mussadiq Hussain Gilani, Registrar Peshawar High Court, June 30, 2010.

about their skepticism of past donor-driven reforms. They opined that such projects had not sufficiently sought and incorporated the views of the judiciary in their reform design, and had essentially generated meaningless reports that never even saw the light of the day. They termed it as "failed and undemocratic project management" on the part of the donors.[15] They also pointed out that they were very uncomfortable with how the USAID Assessment narrowly focused on the valley of Swat, because of its recent troubles due to violent militancy, while professing to propose court management reforms for the entire KP – a large and diverse province.[16] Swat, they said, was not at all representative of the entire province due to its particular history and the largely distinct governance arrangements for that region over the years. They questioned how any reforms visualized while bearing Swat in particular in mind could have any relevance for the very different needs and requirements in the rest of KP.[17]

Similar issues arose when USAID's local consultants sought permission from the High Courts in Sindh and Baluchistan to undertake the USAID Assessment in these provinces. In what was a highly unusual situation – given the close collaboration and links between international donors and the Pakistani judicial leadership during the preceding decade of justice sector reform – USAID banked on the contacts and goodwill of its local consultants in order to garner tokens of official support to operationalize the project. This was a far cry from past practice, where major bilateral and multilateral donors had extensive preliminary meetings and consultations with their senior government and judicial counterparts before embarking on any proposed project. Thus, donor-led reform activity in Pakistan seemed to have entered a new phase in 2010 – a phase characterized by palpable incongruence and lack of communication between increasingly uncertain donors and a seemingly

[15] Meetings with Mr. Lodhi and Syed Mussadiq Hussain Gilani. The senior administrative staff at the Peshawar High Court stressed that the latest USAID project should not repeat the mistakes of the past and that it should invest in the key areas of reform already identified by the judiciary, rather than carry on conducting what they described as "their interminable studies." According to them, the main area of concern remained the poor and inadequate infrastructure and facilities. As to the challenge of delay reduction, they claimed that they were already monitoring the problem closely and making very satisfactory progress.

[16] Meetings with Mr. Lodhi and Syed Mussadiq Hussain Gilani.

[17] Meetings with Mr. Lodhi and Syed Mussadiq Hussain Gilani.

aloof judicial leadership, as well as an exclusive and very narrow focus by the judicial leadership on purely brick and mortar reforms.

Skimming the surface and foretelling reform prescriptions

With the judicial leadership not amenable to consultation, the inception meeting of the USAID Assessment only involved USAID representatives and local consultants. At the meeting, USAID representatives stated that they visualized the project to explore primarily the linkage between delayed cases and the growing case backlog in the district courts of the country with the existence of administrative inefficiencies within the courts, in order to identify suitable responses.[18] Having stated this, they simultaneously and peremptorily laid down a list of reform prescriptions – these essentially entailed more effective training of judicial officers and court staff in court and case docket management techniques. The presentation upfront of a pre-packaged reform menu – a highly unoriginal one, given the AJP's similar forays in this area – foreclosed any real opportunity for a deeper discussion of the phenomenon and contributory causes of delays, and also the potential for diverse empirical inquiries for informing the eventual reform prescriptions. At the same time, it also rendered superfluous the actual eventual findings of the USAID Assessment as a resource for meaningfully molding reform prescriptions, even before the assessment was complete.[19]

[18] Meeting in Islamabad, June 7, 2010.

[19] In the June 7, 2010 meeting as well as in subsequent meetings, the locally hired consultants pointed out that the delays and ever-increasing caseload in the courts (which in turn made it very difficult to reduce the ever-growing gap between case disposal and pending/newly initiated cases) could be for a whole host of reasons. For instance, there was reason to believe, they explained, that excessive litigation and the resulting caseload stemmed from certain archaic or flawed laws, or even the very absence of effective laws and regulations in certain important areas. They cited various examples of cumbersome legal procedures and court processes that were known to be the cause of delay and complications for litigants. They highlighted past evidence of the growing trends of frivolous and/or coercive litigation that went unchecked due to weak disciplinary laws for lawyers as well as inadequate bar regulations. They also emphasized the problem of weak filters and disclosure requirements at the case admission stage, as well as the very low bar of entry to initiate a legal case – due to the ever-available *locus standi*. They also stressed the need for reliable data to further understand the problem of delay and pointed out that the Pakistani court system did not collect, collate, and analyze disaggregated statistics on the nature and number of cases initiated, heard, and decided in a given time period. The only available data, they shared, was at an aggregated level, which precluded the possibility of: determining the nature of the most commonly initiated legal cases;

Furthermore, not only were the reform prescriptions predetermined and unimaginative, they were exceedingly modest. This was despite the considerable feedback and suggestions from the local consultants who exhorted in favor of deepening and fine-tuning the assessment's scope of inquiries and thus the potential of its eventual prescriptions.[20] However, USAID was resolute. It persisted in pitching the USAID Assessment as a very restricted evaluation of: whether judicial officers and court staff in the district judiciary currently received any training in court, case, and record management; whether they followed certain established management practices; and the scope and nature of further requisite training in these areas.[21] The scope of the project was summarized by the USAID

conducting a time series analysis of the types and trends of growing litigation; and establishing the average time taken by different courts for adjudicating and deciding certain kinds of cases, as well as the average time taken up by the different stages of adjudication. This type of evaluation and analysis, the local consultants explained, could pinpoint the exact contributory reasons for delay and case pendency. These ideas to broaden and deepen the scope of the assessment were, however, not entertained.

[20] Opposing the sole reliance on training as a reform prescription, the local consultants pointed out an additional problem. A common perception in the government, donor, and popular consciousness, they pointed out, is that land is the main source of litigation in the country and contributes to around three-quarters of all litigation. The USAID RFQ itself stated that: "In many courts, especially in Punjab and Sindh, land related cases reportedly constitute 60–80% of court case loads by some estimates." No sources were cited, however, for this information. See USAID RFQ, p. 6.

However, given the paucity of available data, the local consultants said that it was next to impossible to tell the extent to which land-related litigation dominated the litigation scene, or which areas of land law were the arenas for most of the litigation. At the same time, it was also difficult to determine the kinds of issues that were most frequently contested in courts and whether that necessitated a revisiting and rationalization of the applicable laws, or deeper political or economic analysis and solutions. It was also necessary to determine, they opined, whether growing land-related litigation was a generic and all-encompassing phenomenon or whether such litigation was growing or declining in some areas of Pakistan as compared to others, in order to gauge the possibility of extensive local variations in the nature of disputes and the resulting litigation in different areas. This, the local consultants stressed, further necessitated that the USAID Assessment include the collection of available data, in order to conduct the aforementioned analysis. Empirical analysis and results may, they said, actually indicate that the problem of delay reduction required several reform interventions, over and above the mere introduction of training in court and docket management techniques. Furthermore, it may also assist toward the establishment of sustainable systems in the district courts for the regular collection of meaningful data in order to inform future policy determinations. These ideas, however, were not entertained (Meeting in Islamabad, June 7, 2010). These ideas and suggestions were also communicated in subsequent meetings and interactions.

[21] The local consultants also suggested an alternative strategy for ensuring that the USAID Assessment was based on some hard empirical basis. They suggested that if rigorous data

representative tasked with overseeing the assessment, who stated that they wanted "a very simple, easy to read and general forty something page report with lots of pictures of crowded courtrooms and poor record facilities, that can be easily understood by USAID staff."[22] The irony of the situation was that these primary assessment queries could be fundamentally answered without the need for any detailed country-wide assessment, simply on the basis of past work and experience in this area. In other words, it was easily verifiable and common knowledge that the judicial officers and court staff in the district judiciary received almost no training in court, case, and record management; nor did they follow any sophisticated and consistent management practices. Hence, there was surely some value in offering training – the extent of such "value" was of course only determinable after probing the degree to which the aforementioned factors contributed to delays and backlogs in the overall scheme of things and then comparing them with various other delay-causing factors and variables, which the USAID Assessment was clearly unwilling to probe. Notwithstanding USAID's limited aspirations, the real and urgent need was to thoroughly probe deeper structural, institutional, and cultural aspects of court maladministration in Pakistan. However, it transpired fairly quickly that USAID had already decided where it wanted to invest and how to invest – the so-called "assessment" was only really meant to generate enough "activity" and paperwork to provide a justificatory garb to its previously determined reform template.

As the days passed, the overwhelming primacy of form over substance – and of quantity rather than quality – became clear beyond any doubt. For instance, the contract terms of reference (ToRs) for the four-person

collection was not possible and the introduction of regular data collection on the part of the district courts was not to be pursued as a policy prescription, at least a representative sample of "ongoing" and already "decided" cases from the selected district courts could be accumulated. This could then be used for a "case file analysis," in order to calculate the average time consumed by every stage of selected types of litigation. Although this would not quite tell us with any great level of statistical significance whether the bulk of litigation in a given geographical area was in certain specific areas of law, it could at least tell us which standard stages of the litigation process were amenable to greater time consumption or delay. Thus, for instance, one could find out the average time taken in "process serving," or the average number of adjournments granted in certain types of cases, or the time taken to record evidence or file written statements. These findings could then be used to determine which factors at that particular stage of the litigation process required attention and reform. These ideas, however, were not entertained (Meeting in Islamabad, June 7, 2010).

[22] Meeting in Islamabad, June 7, 2010.

local consultant team hired to conduct the USAID Assessment initially visualized the coverage of a vast area, comprising twelve geographical divisions spread all over Pakistan.[23] The project was routed through the Asia Foundation for administrative purposes and for providing additional logistical assistance.[24] USAID was supposed to provide the details of how many and which kinds of courts they wanted to be included in its assessment.[25] This was an important decision, considering the geographically vast scope of the work and the very tight project time frame – for instance, the number of days contractually allotted by USAID to the two main local consultants hired to cover two provinces each was only twenty. During this short period, they were expected to cover an expansive area comprising a total of five (for the Punjab and KP) and seven divisions (for Sindh and Baluchistan) and visit a selected sample of courts in each of these divisions in order to undertake evaluations and interviews, collect any available data, undertake analysis, and furnish various

[23] A division is an administrative unit in Pakistan that dates from the colonial administration of the area. It is the next administrative unit below the level of province. Divisions are followed by districts (zillas), sub-districts (tehsils), and union councils. Pakistan currently has twenty-seven divisions, more than 100 districts (zillas), more than 400 sub-districts called tehsils, and several thousand union councils.

The divisions indicated in the ToRs were as follows: Quetta, Zhob, and Makran in the province of Baluchistan; Peshawar and Swat in the province of NWFP (now Khyber-Pakhtunkhwa); Multan, Bahawalpur, and Dera Ghazi Khan in the province of Punjab; and Sukkur, Larkana, Mirpurkhas, and Karachi in the province of Sindh. See USAID RFQ, p. 5.

[24] This turned out to be an unsuitable choice for a whole host of reasons and created many additional problems. The Asia Foundation's (TAF's) local office displayed an acute shortage of management experience as well as domain expertise for acting as an effective administrative liaison for the project. The political-economy of the smaller donor organizations keen to piggyback large multilateral and bilateral donor organizations was epitomized in this arrangement.

[25] See USAID RFQ, p. 6. Certain additional criteria for selecting the courts are also listed here. The local consultants informed USAID that given the variety of courts in the country at the district level (for instance, the district and sessions courts, different kinds of civil courts, anti-terrorism courts, revenue courts, etc.), one could either select certain types of courts, e.g. the revenue courts, and explore a representative sample of such courts for greater vertical coverage, in order to develop meaningful insights into the problems faced by those particular types of courts in a given division. One could then draw a comparative picture of these types of courts across all divisions examined in the USAID Assessment. Alternatively, a broad range of the various types of courts could be selected in any given division (which comprised two to four districts) for greater horizontal coverage, but that would also mean the coverage of a smaller number of courts of any given type in a division.

reports.[26] Some of these areas were very far flung and/or unsafe to travel to, and consequently required significant coordination effort, travelling time, and logistical arrangements in order to successfully reach a statistically relevant number of the different types of courts in each division.

There were also the additional challenges of accessing, persuading, and interviewing overworked judicial officers and court staff, particularly given the absence of any official permission from their administrative superiors. The lack of any readily available data necessitated, but also complicated, the process of unearthing any relevant statistical information. Thus, while being very narrow in terms of its vision and objective function, in terms of the vast extent and complexity of the geographical area and court coverage visualized by the USAID Assessment (as well as the various additional ancillary activities mandated by it), it evinced a highly unrealistic appreciation of the gap between the scope of the project and the actual human resources, as well as time made available for its completion.[27] In other words, while the menu of questions and prescriptions put forth by the USAID Assessment was very limited, the surrounding process was highly complex,

[26] The third consultant in the team was contracted to assist in this process in all four provinces, as well as to conduct an evaluation of the five judicial academies in the country that are located in Islamabad, Lahore, Karachi, Quetta, and Peshawar. The fourth and final member of the team, i.e. the team leader, was assigned to oversee the entire process, help prepare initial questionnaires and work plans, coordinate with USAID, and prepare and finalize the various project deliverables, in view of USAID's feedback – all within a time frame of 30 days.

[27] For instance, the mere coverage of two courts per day and a total of eight courts in an entire division in Sindh or Baluchistan translated into 4 days' work, including travel time, coordination, actual interviews, assessment, the time required for information and data collection, etc., at a fairly rushed pace. At this pace, the coverage of all divisions assigned for the two provinces by the USAID Assessment translated into 28 days' work. This was already in excess by 8 of the 20 days actually assigned to the consultant expected to cover the two provinces. At the same rate of court coverage, a similar exercise for Punjab and NWFP would have also entailed 20 days. This essentially left no time for either of the two consultants assigned to cover all four provinces for any meaningful information and data collection and review, any rigorous analysis, a more incisive assessment, any comparative appraisal, any probing discussions, and also the actual writing of the requisite reports. This is significant given that the USAID Assessment visualized and expressly required that the team members expend sufficient time to review background literature, develop checklists for the issues to be explored during the assessment, develop a training needs questionnaire, and also an assessment outline, while also expecting them to conserve enough time to deliberate, exchange notes, address client queries, discuss, and write. See USAID RFQ, p. 9.

time-consuming, bureaucratized, and, at various levels, untenable – it was very much a case of much ado about nothing.[28]

Geo-political imperatives, discordant donors, and blurred visions

Soon after the inception of the USAID Assessment, USAID representatives tasked with overseeing the project also started revisiting and revising its ambit and outreach in wholly unexpected directions. This was due to the demands from the US Consulate and also in view of the mixed signals from the US Ambassador's office, the Office of the US Special Envoy on Afghanistan and Pakistan, and other voices within USAID – all of them with fairly divergent agendas and hence many different expectations regarding the project. It revealed a fundamental lack of control on the part of the donor to contractually reach an understanding and then adhere to any particular content, direction, and process for the USAID Assessment. It also divulged the strained or broken communication lines among all the aforementioned players. Ultimately, and for present purposes, it exposed very poor project management.[29]

Most notably in this context, in a flurry of confusing and at times contradictory communiqués, USAID first expressed the intent to drastically limit the focus of the USAID Assessment exclusively to the troubled valley of Swat. This radically new direction was motivated by the

[28] In this context, the local consultants urged the USAID representatives to seriously engage in order to decide how many and what types of courts they wanted the USAID Assessment to cover. However, no real clarity emerged as to donor priorities in terms of which kinds of district courts to target. Eventually, the sole outcome of these engagements was that USAID agreed to reduce the overall number of divisions to be covered under the assessment to five: Karachi, Sukkur, Multan, Quetta, and Swat. Although this was an improvement, the assessment's very tight time frame for completion still precluded the possibility of any deeper analysis of the reasons for delay and pendency at the district court level.

[29] For instance, when USAID came under fire from the US Counsel General's office in Peshawar for inadequate consultations with the same and with the Peshawar High Court, before USAID embarked on an assessment of the courts in Swat, USAID avoided direct communication with its annoyed counterparts. Instead of USAID and the US Counsel General's Office sorting out their internal communication and operational issues, the former asked the local consultants to meet and "pacify" the latter. The US Counsel General in Peshawar spent a good part of the meeting with the local consultants criticizing the local USAID staff (meeting with the US Counsel General, Peshawar, June 30, 2010). Similarly, during the USAID Assessment, USAID did not approach the US Counsel General in Lahore and instead sent a team of local consultants in order to apprise her of the assessment findings after the project had been concluded.

escalating US interest in that area due to the introduction of the Shariah Nizam-e-Adal Regulations 2009 (NAR) in the wake of the Taliban uprising in 2009.[30] As a result, well into the first week of the launch of the assessment, it appeared that the Punjab, Sindh, and Baluchistan would be altogether dropped from the evaluation, as would all the initially selected areas in KP, except for Swat. The local consultants objected to this as being clearly in violation of the agreed ToRs of the contract and the overall aim and scope of the assessment. They argued that such a step would radically reduce the scope of the USAID Assessment – originally visualized as a nationwide evaluation – to a project merely focused on a small part of a single province, coupled with the limited agenda of gauging the particular impact of the NAR on the performance of the local district judiciary. They also pointed out that the already excessive focus on Swat was something to which the Peshawar High Court had taken exception, and that consequently it would very likely raise strong objections and may even withdraw its permission to conduct the assessment. After much heated debate over the following days, USAID eventually relented and the assessment resumed its original shape to some extent. However, the project was now required to have an additional heightened focus on Swat with the related new expectation for a separate report on the legal and administrative situation and developments in that area.[31]

There were also some additional, and at times fairly controversial, expectations vis-à-vis the renewed focus of the project on Swat – with the new demands having even more tenuous links with the original project. Apart from the interest in the "Islamic" NAR, for instance, a

[30] These developments will be discussed in detail later in this chapter.

[31] It is hard to overlook the fact that USAID only agreed to partially revert to the original scope of the assessment due to the resilient push back by the local consultants – otherwise it was quite clear that it was now only really interested in what was transpiring in Swat. This became apparent in subsequent engagements as USAID's queries and follow-up conversations remained purely focused on Swat. Questions and information/documents generated about the assessment undertaken in the rest of the country largely remained unanswered and unnoticed by USAID. Soon after, in a second wave of confusing and contradictory communiqués, further conflated by the Asia Foundation's inability to maintain clear and deliberative communication lines, USAID again insisted that additional time from the overall contracted number of consultant days for the assessment be spent in Swat, which is what eventually happened. USAID's demand for an additional report on Swat also required the coverage of the legal and constitutional situation in Swat. This was surprising given that this information is fairly well documented and readily available, and also because it was essentially unrelated to the court efficiency and capacity assessment focus of the USAID Assessment.

related concern of the US Counsel General's Office – which played a significant part in deviating the USAID Assessment from its initial focus – pertained to the legal aspects of the arrest and conviction of the militants in Swat, how this could be made more effective and transparent, and also brought under civilian control. Many of the underlying queries, however, were political and directly pertained to the nature and extent of the militancy in the area, the magnitude of the state response to the same, and the operational details of the army-run detention centers in the area.[32] Quite incredibly, while pursuing these lines of investigation, at times, the donor seemed to be under the impression that it could penetrate sovereign boundaries and legitimately enter the realm of the legislative and constitutional.[33] When the local consultants pointed out the tremendous potential for a major diplomatic embarrassment – especially given the already standoffish relationship with the judiciary – the donor relented; however, soon after it started to pursue other means for taking up the same controversial lines of inquiry.[34] It was quite evident

[32] USAID communicated that given the strong pressure from the US Counsel General's office, it now wanted the local consultants to conduct a specific appraisal of the legal position and actual functioning of the Pakistan-Army-controlled detention centers in Swat. The local consultants responded that these detention centers were out of bounds for civilians and that accessing them would require special permission from the Pakistani Government. They also pointed out the risk of a major diplomatic scandal in case USAID decided to intrude into matters and areas that the government may consider as tantamount to a violation of its sovereignty. Given its earlier experience with the Supreme Court, USAID decided not to approach the government for permission. However, because of its persistent interest in this theme, the local consultants had to eventually generate a report on the legal position of army arrests under Pakistani laws, together with various recommendations for legal solutions to route the detainees to civilian courts. Not surprisingly, this further ate into the time originally assigned for the original targets of the USAID Assessment.

[33] USAID was insistent that the local consultants ought to not only visit what were essentially out-of-bounds detention facilities, but also propose legal and constitutional amendments to resolve the situation. The local consultants pointed out that this was not only a completely new exercise beyond the scope of the contracted project ToRs, but also one likely to create acute political embarrassment and a strong reaction from the government and judiciary, which would fairly perceive this as evidence that USAID was clearly trespassing into sovereign matters exclusively within the domain of the Pakistani Government and judiciary.

[34] Given the imbroglio on this issue between USAID and the local consultants, the former then decided to ask some employees of the local TAF office to prepare a document with proposals for legal and constitutional amendments. The eventual document suffered from several legal and factual mistakes and was never publicly released. This was not an isolated instance. In other similar situations, USAID reverted to TAF in order to generate documents closer to its expectations, even though the latter was contractually bound to

that the US Government's geo-political considerations and strategic imperatives frequently pushed them to persuade the donor to pursue certain "war on terror" goals – rather amusingly under the rubric of what was essentially a justice sector assessment seeking to find out if court clerks were adequately trained to prevent delays in the Pakistani lower courts. As a result of these internal pressures and strategic considerations, the USAID Assessment was increasingly skewed overwhelmingly toward Swat and areas that had little to do with the theme of ordinary justice delivery to citizens. Consequently, in what was originally set out to be a national assessment of court administration practices, more than half of the project time and effort ended up being spent on examining Swat.[35] The insights provided by the three project reports on the other provinces, together with the assessment for the rest of KP, were pushed aside – they remained largely overlooked and under-discussed. Ultimately, there was also little meaningful deliberation on the project's overall findings.

Any objective evaluation of the performance of the district judiciary in Swat, as well as its actual needs and challenges, was made further cumbersome by USAID seeking affirmation of its certain strongly entrenched assumptions and views, regardless of whether the actual information collected and analyzed during its assessment refuted the same – which was actually rather categorically the case. For instance, certain USAID representatives were adamant that the NAR had actually ushered in a new and substantively distinct Islamic legal system in Swat, which they described as a cause of grave concern from an international human rights perspective. They also declared it to be essentially unworkable, repressive, and deeply unpopular in the area.[36] Some of these

merely provide logistical support to the local consultants. The result was both the loss of objectivity and rigor as the local TAF office lacked the capacity to undertake such work. At the same time, such output was often potentially politically disastrous and on more than a few occasions risked the continuation of the USAID Assessment due to a possible diplomatic scandal. As a result, at various stages in the assessment, the local consultants and local TAF office produced parallel documents, or TAF unilaterally made changes to documents generated by local consultants which, at times, resulted in radical changes to the substantive content. The local consultants refused to own the latter or attach their names to the same. To date neither set of documents has been shared with the Pakistani Government, let alone made public.

[35] USAID subsequently hired two additional consultants for short-term assistance in Swat, although by the time they came on board the project was almost over.

[36] Meeting in Islamabad, July 9, 2010. In response, the local consultants explained the history and context of the NAR, its actual content, as well as the actual feedback from

"imagined" demons found sustenance from additional "experts" working with USAID on other projects, who were at times invited by USAID to its meetings with the local consultants working on its assessment.[37]

Formulaic processes and great expectations

A detailed textual appraisal of the USAID Assessment ToRs amply demonstrates the strong "micro-efficiency" focus of the current donor-driven reform approaches in Pakistan.[38] Prominent in this formal list of prescribed activities was the predominance of an emphasis on court

interviews in the area that showed that the assumption was highly erroneous. Much productive time was expended in fighting these "imagined" demons.

[37] Meetings in Islamabad, June 7 and July 9, 2010. At times, these "experts" – who were relatively fairly new to the local context – seemed quite unfamiliar with or unclear about the arguably complex but essentially fundamental legal and administrative arrangements in Pakistan. An illustrative example is when one of the "experts" insisted that the NAR allowed the recruitment of local *ulema* (religious scholars) as judges. The NAR, on the other hand, clearly stipulated that the judges under the NAR can only be regular judges of the KP district judiciary. The lack of requisite familiarity with the local political context as well as the local legal and administrative system on the part of the USAID representatives assigned to oversee the assessment further contributed to the difficulties faced in sustaining focused and informed deliberations.

[38] A summary of the detailed expected tasks under the contract TORs is as follows:

(1) Case backlog/delay reduction. USAID wanted both a review of the previous exercises that examined these problems as well as previous reports on judicial reforms, identification of bottlenecks to efficient court administration, mapping of case processing procedures in the courts, identification of case backlog reduction initiatives, and possible use of technology for case processing.
(2) Case backlog of land cases. USAID wanted an assessment of the extent to which land cases clogged the courts and an identification of discreet interventions targeted at the judiciary to reduce this load.
(3) Professional court administration/case management. USAID wanted an assessment of the needs, skills, and demands for court administration/case management on the part of the judges and court staff.
(4) Court administration/case management training needs. USAID wanted an assessment of the federal and provincial judicial training academies to provide pre-service and in-service training to judges and court staff in these areas and curricular changes/mechanisms/institutions that could enhance meeting the training needs.
(5) Information technology and infrastructure constraints. USAID wanted both an assessment of how existing IT and electronic court information systems and infrastructure constraints impacted delay and pendency.
(6) Strategic planning and budgeting. USAID wanted an assessment of existing strategic planning and budgeting processes in the courts, the impediments (including human and financial resource constraints) faced by them, and solutions to address the same.
(7) Bench-bar liaison committees (BBLCs). USAID wanted an assessment of whether BBLCs had been set up as visualized under ADB's Access to Justice Program, their

efficiency enhancement.[39] As mentioned earlier, certain integral aspects of the visualized assessment were superfluous to start with, as what they sought to research was common knowledge and quickly determinable – such as, for instance, that the administrative staff of the Pakistani district courts invariably receive no pre-service or in-service training for augmenting the skill sets required for their particular jobs, barring very few and infrequent exceptions. Furthermore, it was also generally known that the legal training offered at the judicial training academies was infrequent and of limited ambit, and that while designing and offering training programs, these academies clearly prioritized judicial officers over court staff.

On the other hand, the collection, analysis, and review of quantitative and qualitative data mandated by certain project tasks was simply unrealistic, given the paucity of any credible existing data, the narrow time frame of the assessment exercise, and, most importantly, USAID's clear lack of any real support for any new data collection.[40] So while the TORs stressed the "collection of new qualitative and quantitative data through comprehensive data collection or sampling techniques," in actual practice, this dimension of the TORS was given short shrift.[41] Given the absence of any relevant existing disaggregated data as well as USAID's scant demonstrated interest in the idea of such data collection, at best, the USAID Assessment amounted to a rough perception of the nature, causes, and extent of case delays for different categories of cases. Furthermore, it only provided a broad and vague idea of the case-management practices currently followed by different courts. It also lacked sufficient empiricism and a solid methodological basis to prescribe

mode of functioning, and whether they could play a role in reform, especially in the area of delay reduction.

(8) Gender. USAID wanted an assessment of the number and percentage of women judges and court staff at different levels of courts, and also constraints faced by them in career advancement.

(9) Baseline analysis. Based on existing administrative data, implementation of the NJP, court visits, previous reports, and collection of new qualitative and quantitative data through comprehensive data collection or sampling techniques, USAID wanted reasonable figures for reducing case backlog and delay in courts.

See USAID RFQ, pp. 6–7 (numbering slightly changed by the author to accurately reproduce the ToR requirements).

[39] USAID RFQ, pp. 6–7. This is reflected in tasks 1 to 6, which are all focused on this objective function. Tasks 7 and 8 do seek some generic assessment of the functioning of legal bars and the experience of female judges, but received very little attention in the actual project. Task 9 was promising, but in actual terms there was neither the support nor the time to rigorously collect any new quantitative data.

[40] USAID RFQ, pp. 6–7. For instance, task 9.

[41] USAID RFQ, pp. 6–7.

any effective management practices with real and sustainable results. Ultimately, the fatal combination of the inherent "micro-efficiency" focus of the assessment, the further radically circumscribed ambit of the project due to the shifting goal posts caused by the donor fascination with Swat, the absence of any empiricism-based rigor, the very narrow and unrealistic time frame, and the paucity of any substantive feedback and engagement from the donor, ensured that the USAID Assessment was condemned to the same impotent obscurity as its many predecessors in the previous decade of reform in Pakistan.

The ADB Post-Conflict Needs Assessment for FATA, PATA, and Khyber-Pakhtunkhwa (2010)

If the USAID Assessment displayed the propensity to frame its reform inquiries and potential interventions very narrowly, the ADB Post-Conflict Needs Assessment veered toward the opposite extreme – at least in what it professed to achieve. However, ultimately this contrast was shown to be deceptive. As it emerged, this project shared many characteristics and constraints with the USAID Assessment.

Swat after the conflict

The previous section briefly mentioned the Taliban-supported insurgency in Swat, which is discussed in greater detail below in this chapter. The retaliatory military operation in 2009 caused a wide-scale displacement of local residents to safer parts of the country. Later that year, the ADB reported the completion of its preliminary work toward the eventual launch of a post-conflict assessment of the developmental and rule of law needs of not just Swat, but also many additional areas constituting "special territories" under the Pakistani Constitution (which are also described in greater detail below), in view of earlier and ongoing conflicts of a similar nature in these areas. Its overarching goal, according to the ADB, was to develop a comprehensive framework to address the worsening conflict, provide humanitarian and recovery assistance, and deliver longer-term development and sustainable rule of law for ensuring viable peace – this constituted the ADB Post-Conflict Needs Assessment (ADB PCNA).[42]

[42] Terms of Reference for Resource Person, Rule of Law Specialist for Facilitating Stakeholder Consultations – Rule of Law Sector, Post Conflict Needs Assessment, ADB, Pakistan, April 9, 2010.

FATA in a fortnight

What is significant for the purposes of this chapter, however, is that despite the enormous complexity of the "special territories," the ADB PCNA did not allow for a realistic time frame or indeed follow an adequately rigorous and comprehensive process for meaningful fact-finding, data collection, consultations, and analysis. It was culpable of ignoring the rich and diverse history, distinctive governance mechanisms, and the particular context of these territories. It was designed, structured, and undertaken in a manner that only allowed it to adduce superficial, ahistorical, decontextualized, and ultimately futile findings. Equally remarkable was the stipulated time frame for formulating what the ADB aimed to be "a conflict transforming, peace-building strategy" (informed by and addressing the gaps in the development plans over 10 years). The strategy set out to create conditions of peace, trust, and access in order to make long-term development possible – in all of 15 days,[43] even though the ADB PCNA visualized the pursuit, through such a strategy, of several challenging goals in as many as nine different sectors.

However, I have not merely chosen the ADB PCNA as an illustrative case study for demonstrating the unrealistic frameworks and the consequently mechanical and superficial outputs of current justice sector reform approaches in Pakistan. Quite apart from this, it also provides very valuable insights into the institutional cultures and sociology of the donor organizations currently undertaking such reform.[44] Some of the significant observations – which I shall further explicate in the following narrative – include, inter alia: a highly bureaucratic, overtly complicated, and rigid organizational and project management culture that puts a premium on form over rigor and substance; a domination of reform thinking and execution by several so-called "experts," who often lack any real domain expertise and/or essential knowledge of local context; an inherently closed door, non-participatory ethos that precludes meaningful engagement with ground realities and consultation with vital stakeholders; a reliance on preconceived notions of desirable reform and donor jargon, rather than reform dynamically responding to empirical

[43] Ibid.

[44] The ADB PCNA provided a unique opportunity for such insights into the internal working of the donor organizations involved in justice sector reform in Pakistan, as while the project was led by the ADB, it incorporated other significant partners such as the United Nations, the World Bank, and the European Union.

understanding and local feedback; an obsession with following ossified template formats at the cost of flexibility and learning from reality; erratically shifting goal posts, multiplicity of project deliverables, and unrealistic project completion time frames; inadequate frameworks for embracing and reconciling divergent ideas and achieving nuanced consensus; wasteful overlap, duplication, and lack of coordination between different donors; widespread turf management, obstinate adherence to institutional agendas, and frequently resulting intra-donor conflict; and democratic deficit, lack of local institutional stakes, and the eventual disappearance of such project reports into oblivion.

The following is a more detailed discussion of the above-mentioned observations about the institutional sociology and imperatives, as well as the various internal and external constraints that characterized the ADB PCNA. To the extent possible, I have deliberately retained the original terminology used by the donor agencies involved in this project. This is in order both to provide an accurate description of the nature and scope of work that they visualized in their own specialized language, and to contrast it with the nature and scope of work that was actually undertaken – beyond the veil of donor jargon. The additional reason for reproducing the original terminology and analytical frameworks employed by the donor organizations is that there was much internal debate, nitpicking, and at times even divisive contestation on their ambit and semantics. These recurrent semantic battles and terminological tussles, therefore, are also worth some attention in the context of the larger institutional and sociological analysis of the donor organizations.

The ADB PCNA: structure and objectives

According to the ADB, it had conducted a pre-assessment of the "drivers of conflict" in the region in order to inform the eventual development of the ADB PCNA.[45] The ADB PCNA was thus expected to further build

[45] Terms of Reference for Resource Person, April 9, 2010, p. 1. The ADB pre-assessment was launched in October 2009 and ended in February 2010. According to the ADB, it resulted in a Conflict and Risk Framework (CRF) that identified "drivers of conflict" based on approximately 1,400 consultations in the affected areas as well as wider consultations with journalists, civil society, law and order institutions, parliamentarians from the area, *jirga* members, and literature review, etc. The CRF findings were converted into a framework of government-approved strategic priorities. ADB also generated a Development Deficit Assessment (DDA), which was required to be consulted during the ADB PCNA (ibid.).

upon the findings from the pre-assessment and "produce costed peace-building strategies to meet agreed strategic objectives."[46] In this regard, it was supposed to focus on the "development shortfalls and inequities" that had causal linkages with the crisis.[47]

The ADB PCNA was initially structured to examine nine different sectors.[48] These sectors were to be evaluated by nine independent teams of area experts, led by "team leaders" responsible for coordinating the deliberations and outputs, and for preparing sector reports. The nine team leaders were in turn to report to nine "sector coordinators," who in turn were expected to function in coordination with and through the assistance of a group of representatives from the UN Office for Drugs and Crime (UNODC) and certain retired Government of Pakistan officers with background expertise in the selected sectors. Together they constituted the Sector Coordination Team or SOCT. The overall supervisory mechanism for the ADB PCNA was vested in yet another team, comprising one representative each from four international organizations and donor agencies, namely: the World Bank, the ADB, the United Nations, and the European Union. It was referred to by the rather exalted title of the Primary Core Group.[49]

One of the nine sectors identified for a sectoral study under the ADB PCNA was that of "Rule of Law" (ROL).[50] The specific objectives of the ROL team were to develop a "conflict-sensitive Rule of Law (ROL) sector recovery strategy, transition plan, set of priority interventions" and also "determine financial implications, address the institutional issues and develop inter-sector and cross-cutting linkages with human rights and gender."[51] The scope of work encompassed the entire province of

[46] Terms of Reference for Resource Person, April 9, 2010, p. 1.
[47] Terms of Reference for Resource Person, April 9, 2010, p. 1.
[48] The number of sectors eventually grew from nine to twelve. These were: ROL, Governance, Social Protection, Water & Sanitation, Energy, Infrastructure, Transport, Education, Agriculture, Communications, Health, and Macro-Economy. It was also explored for a while whether a separate team could also be constituted to focus on implementation, budgets, and financial flows between the federal and provincial levels.
[49] The PCNA exercise commenced on April 14, 2010 and final deliverables were submitted on May 3, 2010.
[50] ROL was defined to include the judiciary, lawyers and various law enforcement and paramilitary agencies, legal empowerment policies, and formal and informal justice systems, in terms of their legal, policy, and regulatory frameworks, capacity requirements, and financial/budgetary needs. See Terms of Reference Rule of Law Expert – Individual Consultant, Post Conflict Needs Assessment, ADB, Pakistan, 2010, fn. 1.
[51] Terms of Reference Rule of Law Expert, 2010.

KP and the area comprising FATA.[52] It envisioned an evaluation of the then existing situation in the ROL sector in these areas; an identification of the relevant policy issues; the proposal of prioritized interventions based on a conflict-sensitive ROL medium- and longer-term development strategy; the detection of existing service delivery gaps, as well as infrastructure and other requisite reforms; and a recognition of any cross-cutting issues, inter-sectoral linkages, and the extent of the existing levels of private and informal coverage in the sector.[53] Furthermore, the project also entailed, inter alia, an assessment of the current institutional arrangements, their extant implementation and absorption capacity, and, finally, the submission of a result-based planning framework and cost assessment.[54]

So what does all of this really mean? If we momentarily move away from this prolix donor jargon, the vastness and complexity of the ADB PCNA can be briefly summed up as follows. For our current purposes, if we just look at the ROL sector – which was one of the eventual twelve sectors selected for the ADB PCNA – the ADB essentially required a comprehensive review and analysis of all the diverse and complex laws, governance frameworks, and legal systems in the vast region

[52] I will shortly explain the nature and complexity of these areas.

[53] Terms of Reference Rule of Law Expert, 2010.

[54] The contractual expectations were further elaborated in additional documents in terms of expected "detailed tasks," "specific duties," and "output/reporting requirements." Part of the complexity and confused operation of the ADB PCNA emerged from the multiplicity of documents in which the project's ToRs were explained. These documents often had important variations or differences in points of focus and emphasis. The contractual ToRs for the ROL sector (as opposed to the contractual ToRs for the ROL Resource Person), for instance, had several specific expectations in terms of activities and outputs. They entailed literature review, data collection, and stakeholder interviews (which required field trips to various areas, some of which were far-flung and also still unsafe in view of recent or ongoing militancy). They emphasized a technical as well as contextual/political economy appraisal of the legal and administrative landscape of the area. In view of this, they further required the determination of approaches for: (i) provision of relevant formal and informal and administrative justice services in the affected areas (i.e. judicial, police, para-military, jirga services), both vertically (i.e. considering various individual institutions and organizations operating in the justice sector) and horizontally (i.e. across the justice sector, taking a systems/sector approach); (ii) legal, policy, and regulatory frameworks for the ROL sector; and (iii) where applicable, legal policy and regulatory frameworks for other sectors, in particular, the four strategic components and objectives laid down by the United Nations, i.e.: "build the responsiveness and effectiveness of the state and civil society"; "stimulate the economy in support of employment generation and livelihoods"; "improve provision of basic services"; and "build the conditions for reconciliation and to counter terrorism." See Terms of Reference for Resource Person, April 9, 2010.

encompassing KP and FATA. Formerly the North West Frontier Province (NWFP) of the British Empire – with a turbulent history shaped by the "Great Game" of the nineteenth century and a continuation of various colonial legal and administrative arrangements into the post-colonial era – Pakistan's north west (which borders the even more turbulent Afghanistan) remains a highly complicated legal and administrative terrain. It is characterized by different and, at times, conflicting legal regimes. In terms of the diversity of the legal and administrative arrangements, it is divided into areas called the "Provincially Administered Tribal Areas" (PATA), the "Tribal Agencies" and the "Frontier Regions" – which comprise the Federally Administered Tribal Areas (FATA), and the "Settled Areas" (which is essentially the part of the KP province governed by mainstream Pakistani law).[55] FATA itself is a frequently volatile area of great ethnic and cultural diversity.[56] The Political Agencies comprising FATA continue to operate under the original colonial governance system introduced to the area, through a treaty signed soon after Pakistan's independence in 1947. The treaty allows the tribal elders or *Maliks* representing these areas to pledge allegiance to Pakistan under the guarantee to continue with the same administrative arrangements and privileges for the tribal leaders as originally agreed with the British Government.[57] The debate on whether

[55] For a whole host of historical reasons and resulting arrangements which are beyond the scope of this chapter, all of these areas have had fairly different legal systems and dispute resolution mechanisms in place, in some cases for over a century. See S. Kakakhel, "Integration of FATA into NWFP: An Analysis" (The Forum of Federations Project in Pakistan by the German Ministry of Foreign Affairs, February 2010).

[56] Kakakhel, "Integration of FATA into NWFP," p. 3. The Political Agencies of the "Tribal Areas" comprising FATA are areas that have not been subjected to land revenue settlement (except in Kurram valley of Kurram Agency), or to the regular system of administration of the "settled" districts of the province. The Frontier Regions are smaller areas between the Political Agencies and are administered by the District Coordination Officers of the Government of KP with powers of the Political Agent for the area. In the "settled" districts, land settlement has been carried out under the Land Revenue Act 1878. Regular administration is through an extension of normal laws and standard institutions such as the judiciary, magistracy, police, and general administration (ibid.).

[57] Kakakhel, "Integration of FATA into NWFP," p. 4. The Federal Government provides the development and non-development budgets for FATA. Since 2002, a separate FATA Secretariat – which reports to the Chief Secretary of KP – handles its affairs. Political Agents are the chief administrators in the Political Agencies and they wield judicial and police powers in their areas, deriving their authority from the Frontier Crimes Regulation 1901, which is based upon the principle of collective territorial responsibility for the tribesmen. The Political Agent exercises his authority through tribal elders or "Maliks" and their tribal councils or the *jirgas*, which act as a jury in disputes of all kinds. The

to integrate FATA into the rest of Pakistan and thus extend normal legal and governance arrangements to the same is a highly complex and controversial one, with few clear and rigorously argued and stated positions on the same. This is primarily because such debate has been historically suppressed or ignored. The available literature emphasizes that discussing the future of FATA without rigorous local engagement and a meaningful allaying of local concerns would be a self-defeating exercise.[58] If FATA is complex, PATA does not lag far behind due to repeated experimentation with different governance systems in the area ever since it ceased to be primarily a cluster of small independent states.[59]

And all this in 15 days! The time frame allowed to the ROL "team leader" for conceptualizing, coordinating, and completing the ROL PCNA was also the same. The sheer impracticability of the task becomes further evident if one looks at the multiple "deliverables" that the team

Maliks also assist the Political Agents in matters of security and law and order and are paid an allowance by the Political Agents for this purpose. Policing is performed by tribal levies (supplementary police drawn from the tribes – they are lightly armed, wear uniform, and receive some basic training) and Khasadars (tribal police who patrol FATA and perform multifarious duties under the political administration – they are armed and wear no uniform). Since independence, the Pakistani Government has administered only a small portion of the Tribal Areas (confined to roads, schools, hospitals, residences, and security buildings), and the rest of the area has been managed by the tribes themselves under their *riwaj* or local customs and traditions. FATA is represented in the National Assembly and the Senate by twelve and eight members respectively, but has no representation in the KP Provincial Assembly. Parliament is explicitly barred from legislation for FATA and related matters. So while parliamentarians from FATA can participate in legislation for the whole country, they cannot legislate for FATA (ibid., pp. 5–6). For an overview of the political administration of FATA, see the official website: www.fata.gov.pk/index.php/link?33.

[58] See Justice (Retd.) Mian Muhammad Ajmal (Former Judge Supreme Court of Pakistan, Ex-Law Minister, Government of NWFP), *FATA, its Constitutional Status and FCR* (undated, copy on file with author). See also Kakakhel, "Integration of FATA into NWFP." A proposed draft of new regulations for FATA has also come into the picture that amends the Frontier Crime Regulation of 1901. See FATA Regulation – 2008 (Amended Frontier Crime Regulation 1901) by Reforms Committee headed by Justice (Retd.) Mian Muhammad Ajmal.

[59] Federal and provincial laws have no applicability in PATA unless the Governor of the Province extends their operation under Art. 247 of the Constitution. See West Pakistan Regulation I of 1969. Provincial governors are also empowered to issue regulations for the peace and good government of Provincially Administered Tribal Areas situated in their province. See Constitution of Pakistan 1973, Arts. 246(b)(i) and 247(3). Over the years, several federal and provincial laws have been extended to PATA. Any evaluation of the legal and administrative situation in PATA thus requires not just a scrutiny of the areas' historical experience with different laws, but also an appreciation of the various currents of popular sentiment and indeed resentment against some of this experimentation.

leader was expected to generate in this time frame.[60] Although clearly insufficient even for a broad mapping and an informed generic overview, the 15 days assigned to the ADB PCNA for the ROL sector were also expected to adduce reform recommendations of great specificity and precision. The ADB PCNA documentation delineating the expectations in terms of the project output is replete with language such as, inter alia: "specific, measurable, attainable, relevant and trackable indicators"; "establishing unit cost for various targeted interventions"; "estimating net financial requirements for the sector"; "clear indications of the respective roles of authorities, private sector, civil society organizations, international partners, and other actors in the sector"; and "indicating development goals, impact, outcome, outputs, activities, milestones, inputs and … their corresponding performance indicators, assumptions and risks."[61]

At various points during the ADB PCNA, the local consultants quizzed the ADB as to why a task as significant and also as complex and demanding as this had been allocated such a tight time frame. They were informed that it was initially visualized as a 1.5 to 2-month-long engagement, but that for various reasons its inception was delayed; consequently, the time frame had to be shortened under the Government of Pakistan's pressure for a quick turnaround. It was inquired whether the original ambit of the ADB PCNA had also been rationalized and reduced in view of the now less available time to conduct the exercise, but

[60] The deliverables involved: preparing and submitting a Draft Inception Report (with a ROL assessment outline, methodology, and timeline/work plan); a Draft Transition Results Framework; a Draft Interim Consultation/ROL Sector Report; a Final Transition Results Framework (TRF); a Final Consultation/ROL Sector Report/Appendices; a Draft Final ROL Sector Report; a Draft ROL Sector Annex; Draft ROL Sector Briefs; and a ROL Sector Presentation. See Terms of Reference for Resource Person, April 9, 2010. All of this work was expected to be based on relevant literature review, data collection and analysis, intra and inter-sectoral deliberations, relevant field trips, and stakeholder interviews and consultations. This essentially meant that there was a gap of barely 2 to 3 days between different deliverables. At the same time, the expectation was not merely to provide an informed overview and a framework for future deliberation of reform interventions, but actually very specific outputs (Terms of Reference for Resource Person, April 9, 2010). In addition, the expectations in terms of deliverables were different in the ToRs attached with the Invitation to Work Letter sent by the ADB which had some additional tasks, omitted others in the aforementioned documents, and had different sequencing, details, and emphasis in terms of how the tasks were expected to be completed. See Terms of Reference Rule of Law Expert, 2010.

[61] Terms of Reference Rule of Law Expert, 2010, p. 2.

it transpired, quite remarkably, that the ambit, activities, and deliverables were unchanged from the original.[62]

A spoilt broth

The fourteen-member team constituted to work on the ROL sector component of the ADB PCNA (the "ROL Team") comprised a member of the ADB staff, some external consultants appointed by the ADB, and some UNODC representatives.[63] The size and background as well as experiential diversity of the team necessitated that the initial few days of the ADB PCNA had to be invested in collective comprehension of and familiarization with the various complex project requirements and expectations, in order to distribute specific responsibilities among the different team members. Although the United Nations, as mentioned above, was one of the four overall institutional stakeholders and supervisors of the ADB PCNA, the UN Development Program (UNDP) – which could have brought some relevant and valuable expertise to the exercise – opted out of sending any of its experts for the assessment. Therefore, the UNODC was put forward as an eleventh-hour replacement to represent the United Nations. With its exclusive focus on essentially crime, drug control, and security-related issues, quite naturally the UNODC team members had no prior experience of holistic or multifarious justice sector reform analysis, which was a prerequisite for the ADB PCNA. Not surprisingly, very early on in the project, the UNODC representatives candidly stated that they wanted to take a backseat role in team deliberations and work assignments; all they felt they could meaningfully offer was some

[62] The author acted as the "team leader" for the ROL sector team. This question was put to various ADB representatives during the ADB PCNA and always elicited similar or identical responses. The immediate urgency, it was explained, was that the Pakistani Government wanted the international donors and institutions to expeditiously undertake an assessment in order to use it as a credible basis for collecting international funds for the trouble-struck north-western areas.

[63] The ROL sector team comprised fourteen individuals. In addition to the "team leader," the team had one ADB staff member and five external consultants hired by the ADB who had varying levels of experience in the areas of legal reform, police reform, gender policy, and transitional justice. The least experienced team members had no prior experience of such work and also no prior exposure to the pressures of working within such tight time frames. The rest of the team comprised UNODC staff with more specific experience in the specialized areas in which UNODC operates. They had little or no experience of legal policy reform, the ROL sector, or judicial and administrative reforms.

"expert opinion" on the security-related aspects of the ROL assessment, and only then toward the end of the exercise.[64]

The ROL Team deliberations were frequently interrupted by mandatory sessions with rotating "experts," who went from one sectoral team meeting to another, in order to emphasize the coverage and evaluation of their particular domain areas. As a result, various time-consuming sessions were held with a "Conflict Sensitivity Advisor," a "Gender Sensitivity Advisor," and a "Development Deficit Assessment Expert."[65] Given that the fairly generic ideas that they reiterated were already enunciated in the ToRs as well as the additional documents pertaining to the ADB PCNA, these engagements were largely superfluous. On the other hand, when these "experts" were asked for specific information or for access to any available relevant data, or if they were invited to engage substantively with some of the ROL issues that could benefit from additional informed perspectives, it transpired that they had no new information or particularly considered views on these matters nor the time to discuss them. Their sole task, they informed the ROL Team, was to regularly communicate to the different sectoral teams that their specific domain areas were to be necessarily addressed in the assessment deliverables, and strictly in accordance with the template format provided.[66]

[64] Although the UNODC team originally also agreed to help toward the examination of the areas of policing (including non-state/informal and quasi-formal structures), investigation, prosecution and prisons, international human rights standards, and civil accountability, at a fairly early stage of the ADB PCNA, they more or less withdrew themselves, reappearing only when final reports were submitted for review.

[65] The "Conflict Sensitivity Advisor" essentially communicated that the RoL Team needed to be cognizant that some of the areas being examined in the assessment were in a state of conflict or had just emerged from conflict, and hence had special needs and requirements for the mitigation of "conflict drivers." The "Gender Sensitivity Advisor" emphasized that conflict had an additional adverse impact on women and necessitated an appreciation of the existing gender barriers in Pakistani society. The "Development Deficit Assessment Expert" underlined that the recommendations to be made by the ROL Team also needed to address the future development needs for the region. Toward the tail end of the ADB PCNA, another "Conflict Sensitivity Advisor" appeared with his own set of comments and expectations. All that these "experts" had to say was already stated in the project ToRs.

[66] The multiplicity of rotational "experts" actually contributed to the recurring contradictory signals sent to the ROL Team regarding the desired thematic emphasis in the ROL deliverables, with, inter alia, "peace-building," "development," "transitional justice," and "meaningful law reform with a focus on citizen rights," all offered as the primary focus of the ADB PCNA at different stages during the course of the assessment. When asked for more specific informed views on certain important issues such as public perception about externally introduced law reforms in FATA, the aforementioned rotational "experts"

While these frequent but ineffectual interactions had an adverse impact on the smooth and uninterrupted operation of the ADB PCNA, potentially much more important engagements were actually neglected. Early on in the assessment, it was communicated to the different sector team leaders that their recommended reform interventions for their sectors needed to be sequenced, dovetailed, and built upon interventions suggested by other sectoral teams.[67] Thus, ROL deliberations, for instance, were to be conducted while visualizing in particular the related issues of governance, social protection, infrastructure, and macroeconomy – areas under scrutiny by other sectoral teams. This obviously necessitated ongoing interface between different sectoral teams. However, no such interaction was formally visualized in the ADB PCNA work plan. Such indispensible interaction could not even be informally arranged due to the scarcity of time and the perpetually looming deadlines over everyone's heads.[68]

It is also crucial to mention here that although the ADB PCNA's ToRS visualized extensive engagements with important stakeholders in the region, both to inform reform thinking and prescriptions and to generate a wide-based support for the same, its design, time frame, and the number and complexity of its deliverables completely ruled out that possibility. Once the ADB PCNA was initiated, the fact that there was no genuine donor commitment to ensure such indispensible consultations was fully

essentially offered their personal opinions rather than information backed by any hard evidence or data. These personal opinions could also be fairly polarized. Some extended a strong condemnation of the traditional political agent/*jirga* system in FATA and reported the emergence of a new educated power elite that was demanding a move toward mainstreaming the legal system. Others extolled the continuing benefits of the traditional political agent/*jirga* system, given the special socio-political context of FATA, as well as the wide and still intact local support for the continuation of this system. The only common thing in all of these views was that they were essentially all *views*, unsupported by any hard evidence or data.

[67] Terms of Reference Rule of Law Expert, 2010. Additionally, identical templates were provided to the teams looking at other sectors without any indication of the dissimilar nature of the tasks assigned to them. See Terms of Reference of Governance Expert – Individual Consultant, Post Conflict Needs Assessment, 2010.

[68] The "governance" sector had a strong overlap of ambit and activities with the ROL sector. Thus, it was important for the two sectoral teams to collectively visualize appropriate governance goals, frameworks, and requisite laws for the region being examined. However, it was only through some chance meetings that the two respective team leaders got some indication of what the other sectoral team was thinking. Not surprisingly, there often emerged issues and contradictions that could have been easily avoided through regular mutual consultation.

exposed. For instance, as it turned out, the few government representatives and political agents from FATA and KP whom the ADB had invited to Islamabad for consultations with the ROL Team never turned up. However, no subsequent attempts were made by the ADB to contact, invite, and consult alternative people – the internal donor understanding appeared to be unequivocal that there was really no pressing need to do so. Thus, like its predecessors, the ADB PCNA also suffered from an acute democratic deficit and lack of stakeholder participation – and it was similarly unabashed and blasé about it.[69]

The template universe

In addition to the multiple aforementioned tasks and expectations, which in turn were spread across several documents, the sector teams were also provided with a three-page "outline" for what was expected to be a twenty- to thirty-page Sector Report – with ten of these pages dedicated to appendices.[70] However, rampant confusion persisted as to the precise expected length and structure of the Sector Report throughout the short life of the ADB PCNA.[71] This may seem like dull minutiae and hence not worth

[69] Similarly, a review of the pre-assessment data collected by the ADB (which had translated into its "Conflict and Risk Framework" (CRF)) soon revealed that the kinds of ROL issues and questions that the ROL report was contemplated to visualize had been barely touched upon in that exercise. In other words, there was an utter paucity of relevant information and data to inform ROL interventions in FATA and KP. Given this state of affairs, the ROL Team insisted that some additional time be allowed to excavate any additional available data and to, at the very least, hold additional discussions with vital stakeholders, such as legislative representatives from FATA, political agents, and other informed individuals and organizations. The ADB response, however, was one of disinterest. The feedback was to focus on meeting the mandated deadlines and to work with the information already available.

[70] "Pakistan Post-Crisis Needs Assessment for NWFP and FATA: Sector Assessment Report – Annotated Outline" (2010).

[71] The outline stated that the sector report ought to be twenty to thirty pages long, with the subsequent clarification that of these pages, ten pages were for appendices. Fairly soon, however, confusing messages started arriving from SOCT and the "sector coordinators" that put the expected length of the sector report anywhere between ten and forty pages, with different permutations and combinations for the allowed space for the main report and appendices. At different points in time during the ADB PCNA, team leaders for different sectors operated under different understandings of the expected length of the report. Finally, the ROL Sector Report was required to be reduced to only ten pages of overview and analysis and twenty pages for the Transitional Results Framework (TRF) and Appendices. Since ROL was only one of the sectors among the twelve that were the focus of the ADB PCNA, the eventual space

discussing. However, the devil did lurk in the detail, but in an altogether different connotation from that of the common idiom. It was the almost fanatical quibbling over mostly pointless details that diabolically sucked the soul and marrow out of the entire endeavor. To illustrate this point, it is highly instructive to briefly examine the structure and framework of the aforementioned "outline." It proposed a structure of: (1) Main Findings; (2) Process; (3) Prioritization and Entry Points for Peace Building; (4) Financial Needs and Transitional Results Framework; and (5) Monitoring. These headings had further sub-headings. For instance, the heading "Main Findings" had the sub-headings "Situational Analysis," "Critical Data and Information," "Sector Needs," and "Institutional Arrangements." The sub-headings in turn had sub-sub-headings, which also mandated extensive coverage. For instance, the sub-heading "Situational Analysis" required responses to questions such as: "What is the overall situation of the sector?" "What were the key findings of the assessment?" etc. A question seeking an understanding of the overall situation of a sector as complex and an area as diverse and variegated as the one under consideration necessarily required multi-tiered and nuanced responses. Yet, the suffocating paradox was that all of these multiple and detailed queries were to be somehow addressed and fitted into a twenty-odd-page report – an impossibility given that there were over fifty such sub-headings and related queries that required detailed and meaningful responses. After all the recurrent confusion over the precise size of the report, the tight noose of a highly abbreviated length, however, never loosened.

An additional problem was triggered by the fact that the templates provided to the sectoral teams did not ensure any certainty or consistency of purpose – which is what templates are inherently designed to achieve, often at the cost of flexibility, as they attach greater premium to certainty over flexibility and spontaneity – as they kept undergoing modifications in view of comments, feedback, and new thinking on the part of the upper levels of project supervision. These modifications always took place without any consultation with the sector teams. At times, these inexplicably and hastily modified templates contained mistakes or ambiguities that necessitated revisions, often at a stage when considerable work had already been undertaken in view of the initial template. On other occasions, new templates were developed by the SOCT and sent on to the sector teams without any explanation, so that it remained ambiguous

allotted to the ROL Sector Report in the PCNA Main Report was a mere six pages for the report and another four pages for the TRF.

whether they superseded or supplemented earlier templates. This disruptive practice continued throughout the ADB PCNA.[72]

Further complications also emerged due to the zealous ongoing disagreements between the ADB members of staff and the UNODC representatives on the ROL Team regarding the most suitable template design and structure for the reports. Galvanized by their respective institutional preferences on form and style, these battles on the trivia of the templates degenerated into a long and disruptive conflict.[73] To conflate the already considerable confusion, midway through the already frenzied ADB PCNA, the SOCT sent urgent intimations about the presence and availability of a "Results Expert" whom every team leader was required to meet toward the end of the ADB PCNA engagement – which essentially meant in less than a week. The Results Expert, it transpired, was tasked to ensure that the final sectoral output fulfilled all of the stipulated template expectations. While different templates evolved and dissolved with dizzying rapidity, the overseers of the ADB PCNA remained completely unmindful of the fact that sectors such as ROL were confronted with an acute shortage of credible data and had no time whatsoever for generating any new data on their own. By the time the reality check came, it was too late in the day to do anything about it.[74]

[72] The templates that arrived halfway through the ADB PCNA mandated even more specific outputs, while also putting forward additional factors for review. These new and supplementary expectations were highly unrealistic due to the aforementioned acute time constraints. For instance, these new templates required the development of specific short-, medium-, and long-term policy prescriptions that promoted ROL, addressed development concerns, and identified development opportunities, while being sensitive to peace-building, human rights, and gender issues. Furthermore, the final set of revised templates required the sectoral teams to provide specific and costed reform interventions, and a financial plan for several different time horizons, i.e. for 6 months, 6 to 30 months, and 10 years.

[73] The ADB staff member insisted that the ADB PCNA and the ROL Sector Report were to be envisioned and framed according to the ADB's "sectoral approach." The UNODC representatives, on the other hand, were adamant on the merits of the UN's "pillar approach." Although the existing template for the sectoral reports had actually attempted to amalgamate both the "sectoral" and "pillar" approaches, the battle of the templates continued unabated through the ADB PCNA.

[74] There was very belated acknowledgement by the SOCT of something consistently pointed out by the ROL Team since the inception of the ADB PCNA, i.e. the paucity of data, especially for FATA. More than halfway through the assessment, the SOCT wrote to the sector teams, agreeing with the oft-expressed need to clarify, clean up, and improve the statistics being used across the different sector reports, admitting the fact that many different and at times contradictory statistical bases were being used across the board. The SOCT indicated that it would attempt to compile and consolidate data where possible, but finally and openly acknowledged that reliable data for FATA was "virtually

Once the various sectoral reports were submitted to the ADB for review and the ADB PCNA formally came to a close, there ensued another 5-week-long battle between the ADB and the UNODC representatives and other donor organizations over the form and structure of the report – which, thus, lasted for a period that was twice as long as the time actually allotted to the undertaking of the entire ADB PCNA. While new battle lines were drawn based on entrenched positions on stylistic preferences, any subsequent substantive review of the reform recommendations was only occasional and highly superficial.

The secret life and parallel universe of reform recommendation reports

When this long-drawn dispute eventually petered out, the PCNA reform recommendations were never heard of again – they simply disappeared and were not shared with the media, academy, policy circles, various reform stakeholders, or the general public. They are still inaccessible unless one knows someone in the coterie who may have access. Occasionally, one hears some murmurs in the donor circles about the possible resurrection of the ADB PCNA framework in order to inform some future projects. However, so far one has not actually witnessed this miraculous rebirth. Thus, their fate was no different from the output of prior donor endeavors of a similar nature. They too are largely absent from any wider local academic, policy, political, and social discourses.[75]

Therefore, it would not be fantastical to state that there is a secret life of donor-driven reform recommendation reports. The above description has made an attempt to provide a glance at this surreptitious existence. Such reports are also clandestine in the very act of their creation. Very few outside the exclusive coterie of senior government officials and

non-existent" – thus begging the overwhelming question as to why requisite attention and effort had not been focused on generating such vital data prior to and during the ADB PCNA. (Correspondence from SOCT to sector teams, April 2010.)

[75] Such is their anonymity that, while planning some projects for FATA in 2011, some senior justice sector advisors at the USAID office in Islamabad simply could not trace these reports. This is despite the fact that they have regular contact and ongoing projects with the ADB, and are also in close physical proximity to the ADB office in Islamabad. Eventually, the author – who worked as a consultant on the ADB PCNA – had to arrange access. In late 2012, the ADB PCNA had a reincarnation as the guiding document for a DFID-funded "ROL" project for FATA and KP. It remains to be seen how this reincarnation fares.

reform consultancy professionals play a role in their imagining and genesis, and can testify to their birth and growth. Once developed and matured, their reclusiveness persists as they hardly ever come under public purview. They seem to float free in some parallel universe that one cannot access, unless one belongs to the aforementioned coterie.

The reform areas broached by the USAID Assessment and the ADB PCNA were highly challenging. While the USAID Assessment undertook to comprehend the multi-tiered and empirically ignored phenomenon of escalating litigation and case delays in Pakistani courts, the ADB PCNA confronted the multiplicity of conflated historical and contextual factors that block the prospect of reforms in FATA, PATA, and KP. Yet the two case studies highlight a stark and jarring disconnect between the arduousness of the reform terrain they endeavored to traverse, and the unimaginative, non-participatory, and often parochial nature of their reform evaluations and prescriptions. The following sections provide additional insights into the growing gaps between the actual and complex challenges on the ground and the current Pakistani donor- and judiciary-led approaches to justice sector reform.

A view from the field: district judges on justice

While the above two case studies provide an insider's view of the contemporary state of the lofty and cloistered donor-driven reform exercises in Pakistan, it would be valuable at this stage to shift the focus and to lower the gaze for an examination of the actual conditions of the lowest rung of the court system in the country – the district judiciary. This is necessary for two reasons: (i) While so far this chapter has conducted a macro evaluation of the current Pakistani reform discourse, it is only natural to now extend the scrutiny to the very bottom level, in order to better appreciate the correlation between this elevated and exclusive reform thinking and the character of the actual problems impeding the operation of the legal and judicial system at the level most frequently encountered by ordinary citizens. In this connection, Chapter 2 has already demonstrated the multiplicity, complexity, and arduousness of ordinary citizens' experiences in the Lahore District Courts. It would be instructive to supplement as well as compare those findings with any insights into the challenges faced by the district courts in other areas of the country. (ii) Given the overwhelming donor and governmental focus on and fund allocation to "efficiency" oriented – and now the "micro-efficiency" oriented – court-centric reforms, it is

necessary to further gauge their impact in the narrow domains of their choice. Therefore, the following is an "as we speak impact assessment" of the various aforementioned managerial, administrative, and infrastructure reforms, meant to complement the extensive structural, substantive, and cultural impact assessment conducted in Chapter 5.

Multan: a crumbling edifice

The Multan District Courts present the ubiquitous spectacle of district courts all over the country. Multan is both a division and a district. At the time of writing, the court complex, which is also the district headquarters, housed twenty-two judges. The crumbling courtrooms and judges' chambers were surrounded by a chaotic warren of lanes and side streets, choking with ramshackle wood and plywood lawyers' offices. Throngs of hapless-looking rural litigants squatted around these offices, mostly dressed in shabby village garb of *dhotis* (a long piece of cloth wrapped around the midriff) and *kurtas* (long shirts), with pieces of cloth wrapped around their heads. They were swarmed by noisy notaries, legal paper sellers, touts, junior court staff, and lawyers. Due to the lack of covered seating areas, they mostly sat under the blazing sun or crowded under any vague promise of shade. The courtrooms and administrative offices were invariably cramped, damp, ill-lit, and suffocating. They almost always displayed peeling wall paint, imperceptibly functioning fans, and some basic furniture. In some cases, the courtrooms were so cramped they barely had enough space for the presiding judge, a court assistant, their respective chairs and desks, a docket, and possibly two or three more people. In such courtrooms the space constraint forced most of the concerned people in any given court hearing to actually stand in the corridor outside, constantly jostling to squeeze into the court in order to hear what was transpiring.

The District & Sessions Judge, Multan – the senior most district judge in the district and the administrative head of the district judiciary, was very keen for the author to take a look at the court record room. It was a large, dark room with thousands of case files piled high in every corner – sometimes in sacks, others loosely stacked in tottering heaps – in no discernable order. The Senior Civil Judge Multan, on the other hand, pointed out a small wooden almirah with a handful of statute books and a few law digests – essentially the entire library at the disposal of the judges. The author was told that this invariably necessitated the judges to request the lawyers appearing before them to provide photocopies of the

legal authorities and precedents that they were going to cite while advocating their cases in court. There were a few computers here and there, but these were used for office correspondence, rather than any case file and docket management or legal research. Despite its overwhelming focus on infrastructure development and the administrative capacity building of the courts, and also the upgradation of technical equipment, etc., the AJP and other similar donor projects seemed to have had no discernable positive impact on the sorry state of affairs at the Multan District Courts.

The Senior Civil Judge Multan wore a bemused and incredulous expression while the author engaged him in a discussion about the focus and reform priorities of the government and the donors, and also explained USAID's specific interest in gauging and enhancing the District Courts' managerial capacity to expedite the disposal of cases.[76] He candidly opined that such capacity enhancement would at best cause a minor improvement. This, as he explained, was because the real reason as to why the disposal was low was that the courts were simply buried under a mountain of cases – and the factors that caused the latter were overlooked by the reformers. Any endeavors toward an expedited disposal of cases, according to him, were outstripped by the consistently increasing levels of litigation and hence the ever-mounting workloads. Thus, the chasm between disposal and newly instituted cases was an ever-widening one. When probed as to why litigation was consistently on the rise, he attributed it to irregular and inadequate legislation. This resulted, according to him, in the perpetuation of outdated laws that exacerbated the gulf between social realities and the letter of the law. He cited many examples of dated laws that were the source of excessive litigation in Multan, much of which, he claimed, was frivolous and motivated by mischievous or coercive agendas.[77]

The judge pointed out many illustrative examples of the areas of law where, according to him, excessive litigation took up a large amount of court time and energy, such as, inter alia, suits for declaration of legal heirs – where, according to him, there was no real need for the court to be involved in declaring the legal heirs of a deceased person for the purposes of transfer of inherited property. The task could be adequately performed through other mechanisms without the mandatory involvement of the courts. He highlighted private criminal complaints wherein

[76] Interview with Mr. Chaudhry Zia Ullah, Senior Civil Judge Multan, June 28, 2010.
[77] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010.

the existing law mandated the appearance of the accused – whereas, according to him, a judge should have the discretion in such cases to decide whether the complaint was frivolous or vindictive and hence not deserving of further attention. He also indicated multiple gaps in the land acquisition and transfer law regime that allowed for the rampant use of forged stamp papers as well as fabricated agreements to sell property – this, according to him, could be easily rationalized through appropriate legislation by making the registration of the land titles mandatory, and also through the greater use of technology for ascertaining the legitimacy of such legal transactions. He also laid emphasis on the growing abusive and fraudulent misuse of court-appointed local commissions to oversee the transfer of property, and various other problematic areas of the existing property, family, and inheritance laws.[78]

The judge also discussed the various serious shortcomings of the country's law of evidence. He pointed out, for instance, the lack of importance attributed in the existing law to the value of circumstantial evidence – which was very important in the context of terrorism cases, and especially suicide attacks, where no eyewitness testimonies were available or forthcoming. He also highlighted the poor quality of police investigations as a major reason for the low rate of conviction in the country and the excessively prolonged criminal cases. This, he said, also led to the phenomenon of repeated engagement in criminal activity on the part of criminals who were either acquitted or got bailed out due to various legal lacunae.[79] According to him, the various gaps and flaws in

[78] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010.

[79] The weaknesses in the law of evidence were further highlighted by Mr. Ghaffar Jalil, Judge, Anti-Terrorism Court 1, Multan, in an interview dated June 28, 2010. He said that the law had not evolved so as to adequately deal with the growing number of cases under the anti-terrorism regime. The very nature of such crime, which often included suicide attacks, precluded the possibility of any eye-witness and/or confessional evidence. The acute need for admitting circumstantial evidence in such situations as well as the various breakthroughs in forensic and investigative technology to detect and prove criminality, remained unrecognized at the legislative and policy levels. In these circumstances, it was left entirely to the judges to expand the ambit of the law through expansive interpretations, in order to tackle the real-life issues they confronted while trying terrorism cases on a daily basis. This, according to him, resulted in an undesirable level of variation in the legal interpretations across the court system. In this context, see also the highly informative piece by Mr. Zulfiqar Hameed, a senior police officer and one of the resource persons interviewed for this book. See Z. Hameed, "The Anti-terrorism Law of Pakistan: Need for Reform," *Social Science & Policy Bulletin*, 3(3) (2012), 2–9, Development Policy Research Center (DPRC), Lahore University of Management Sciences (LUMS), http://dprc.lums.edu.pk/components/com_publications/attachments/11-SSPB-WinterSpring-2012.pdf.

the current laws and regulations, as well as the hasty and less than comprehensive law-making, frequently resulted in multiple, and often contradictory, judicial interpretations that were aimed at bridging such gaps. This in turn caused confusion and fuelled further litigation. The judge also felt that the existing procedural laws ensured a very low bar for *locus standi* and also guaranteed inadequate disclosures at the case inception stage. Thus, the existing filters, for what were frequently frivolous cases, were weak and dysfunctional.[80] Once such unmeritorious cases squeezed their way into the system and were formally admitted for hearing, any subsequent efforts by the judges to dismiss them – on account of being frivolous, for not being backed by sufficient evidence, or for being motivated by bad faith – were aggressively thwarted by the lawyers. The latter, according to the judge, had developed a very hostile attitude toward any judicial steps that promoted the maintenance of any merit and standards. Some of the more rowdy elements among the legal fraternity also engaged in frequent verbal and physical harassment of the judges. Thus, many frivolous cases enjoyed a long and resource-draining existence in the court system.[81]

In this context, the judge strongly stressed the urgent need to closely review all those areas of law that had become the arenas of legal abuse and fraud, and to expeditiously introduce legislative and regulatory solutions.[82] He further said that paying close heed to a regular feedback from the end-users of the justice system, and a serious consideration of their actual everyday experiences in the courts, were highly necessary for informing meaningful legislation and reform. It was equally important, according to him, for the judicial leadership to listen to the district court judges, who had a much keener sense of the contributory reasons for court delays, as well as the impediments to reaching fair and timely decisions. This, he complained, almost never happened, as those who drove the reform agenda from above did not consult those in the trenches. Thus, their reform prescriptions invariably missed the mark.[83] In conclusion, the Senior Civil Judge categorically declared that merely increasing the number of judges, training them better, and providing

[80] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010.

[81] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010. Many of the other judges interviewed in Multan also complained very strongly about the harassment and coercive tactics used by the lawyers, and declared this to be the main impediment to the curtailment of frivolous and mischievous litigation.

[82] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010.

[83] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010.

them with new offices and computers was not really going to address the main issues confronting the Pakistani justice system – since these issues primarily stemmed from legislative inadequacy, the resulting misuse of the legal system, the emergence of coercive and exploitative lawyer mafias, and outdated regulations and procedures.[84]

Many of the other judges interviewed in Multan also complained about the inadequate disciplinary regulations for the legal bars, as well as deficient judicial powers to penalize unethical and misbehaving lawyers. These, they felt, were formidable impediments to curbing frivolous and coercive litigation.[85] They also explained in detail how each and every step of the criminal justice system – the police investigation, the prosecutorial review, the registration of a criminal case, the formal indictment process, the trial, the recording of evidence, etc. – was riddled with flaws and opportunities for abuse.[86] This was not just due to the poor legal preparation of the lawyers, the lack of training for judges, and the near-absence of forensic facilities, etc. but was the outcome of a dated and chronically deteriorating legal process and procedure.[87] Thus, they too voiced the crying need to revisit and reform the existing law and procedure. Other interviewed judges highlighted the erratic and non-transparent access to training opportunities at the judicial training academies – the training itself, they felt, was of limited utility as it did little to equip the judges to effectively run trials, efficiently manage their courts, and satisfactorily address the various other real-life challenges that regularly cropped up in courts.[88] They also lamented the poor library and research facilities at the District Courts, which had received no upgradation despite all the talk they had heard of the donor money invested in brick and mortar as well as facilities upgradation of the district court system.

Some of the judges were of the view that, unlike other government officers, district court judges were invariably denied any opportunities to

[84] Interview with Mr. Chaudhry Zia Ullah, June 28, 2010.
[85] Interviews with Mr. Syed M. Ilyas Shah, Civil Judge (1st Class), Multan and Mr. Shakil Sipra, Judicial Magistrate, Multan, June 29, 2010.
[86] Interviews with Mr. Syed M. Ilyas Shah and Mr. Shakil Sipra, June 29, 2010.
[87] Interviews with Mr. Syed M. Ilyas Shah and Mr. Shakil Sipra, June 29, 2010.
[88] Interviews with Ms. Zahra Mansoor Malik (Civil Judge) and Mr. Rai Muhammad Aftab (Civil Judge Rent), June 29, 2010. Also, interview with Mr. Syed Ijaz Ali Shah, District & Sessions Judge, Multan, June 30, 2010. He was joined in this critique by Mr. Ishtiaq Ahmad, District & Sessions Judge and Member of the High Court Inspection Team (MIT), June 30, 2010.

attend training courses in foreign universities and judicial academies. They blamed this on the appellate judiciary's generally aloof and hierarchical attitude toward them. There was no mechanism for or practice of exchange of ideas between the two – the sole mode of interaction was strictly top-down: they only received instructions, targets, and directives. Thus, they felt that they were not just "subordinate" or "lower" in terms of their description, but also invariably treated as such.[89]

The District and Sessions Judge Multan was equally skeptical about the panacea of efficient case-flow management for the chronic delays and backlogs. When asked about the prevalent case management practices, he said that the near absence of any regular mechanisms for the collection and analysis of data about the number and kinds of cases filed in different courts impeded any case management planning.[90] He was also scathingly critical about the value of the ADB's AJP and felt that it was essentially a loan forced on the country by an international donor.[91] He insisted that even if the AJP's reforms had all been implemented – and his view was that they had fallen far short – the courts had no chance of catching up with the high rates of litigation that were escalating due to a whole host of reasons.[92] Outdated laws, cumbersome procedure, rapacious lawyers, corrupt and inefficient police investigation, and illiterate and gullible litigants, collectively contributed, in his world view, to excessive and delayed litigation and an ultimately crumbling justice system.[93]

A fundamental impediment to justice, he proposed, was that the predominant majority of litigants did not understand English. Thus, they had no idea why a judge had decided against them. This further exaggerated their already high reliance on the lawyers, who often misled them into challenging court decisions, even when they had no arguable case or justification for appeal.[94] At the same time, the use of English could also sometimes insulate the bad judgments: on occasions, the litigants at the receiving end of such judgments did not realize they had a cause for appeal, due to their ignorance of the language.[95] He was also of the considered view that alternative dispute resolution systems had been

[89] Interviews with Ms. Zahra Mansoor Malik and Mr. Rai Muhammad Aftab, June 29, 2010.
[90] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010.
[91] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010. He was joined in this critique by Mr. Ishtiaq Ahmad, June 30, 2010.
[92] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010.
[93] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010.
[94] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010.
[95] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010.

consistently neglected by the judicial leadership, as had been the local modes of dispute resolution, such as the *panchayats* – which, according to him, could ease the workload of the judges, and provide the disputants with cheaper, intelligible, and more accessible alternatives.[96]

It is fairly significant to note here that the appellate judges, lawyers, and more aloof commentators on the Pakistani justice system frequently refer to the district court judges as the "lower" or "subordinate" judiciary. The subordination, however, is not just restricted to the title. District court judges, as can be seen above, often complain of the appellate judges' superior attitude toward them.[97] However, in various ways, the feedback from the district judges in Multan can be considered as fairly atypical, which makes it highly compelling. Stock responses on their part could be expected to overwhelmingly dwell on their sense of feeling slighted and various other personal grievances. The atypicality of these responses lies, however, in the fact that despite the judicial complex's inadequate physical infrastructure and facilities, as well as the existence of what are widely regarded as fairly uninspiring financial and general employment incentive frameworks for the district court judges, these were not the exclusive or even the primary themes of discussion in the feedback. The judges were not preoccupied with complaining about salaries, facilities, perks, and a denuded and bruised sense of importance that one might expect from judicial officers at the bottom of the judicial hierarchy almost anywhere in

[96] Interview with Mr. Syed Ijaz Ali Shah, June 30, 2010. This was further asserted by Mr. Ishtiaq Ahmad, June 30, 2010. Mr. Ahmad was on an inspection tour of the Multan District Courts and agreed to share his thoughts on the matter. He stated that the Government of Punjab had issued a notification that a list of arbiters be finalized so that the courts could refer cases to them for arbitration. However, to date, the list of arbiters had not been finalized. At the same time, he confided that the judges seemed reluctant to forward cases for arbitration, both because the idea was new to them, and also because they did not want to relinquish turf. He was also very critical about what he described as the increasingly unprofessional and unethical behavior by the lawyer community to pressurize courts to decide cases in their favor, in the wake of their newfound empowerment after the Lawyers' Movement. He further said that the available judicial training did not prepare the judges to appreciate their local context and its complexities, which were vital to understand in order to deliver just pronouncements.

[97] There is a tendency among judges in less elevated positions, more or less everywhere, to have several levels of critique and dissatisfaction reserved for their more empowered and advantageously placed "superiors," especially since the latter invariably control their careers. Such irksome quibbling stemming from a career on the lower rungs of the judicial system may not always be a grave cause for concern. What is required, however, is objective evidence that may help distinguish any habitual and/or unsubstantiated whining from any concrete episodes of actual institutional neglect and exclusion – which can create "subordination" of an unacceptable and morale draining kind.

the world. Instead, they focused on institutional themes pertaining to personal and professional development, performance, and capacity building. For instance, all ten judicial and court officials interviewed in Multan prominently highlighted infrequent and inadequate judicial training as a major problem and expressed a keen desire for additional and better training.[98] Although they did occasionally underemphasize their own role in the persistent inefficiency and dysfunctionality of the court system – mostly presenting themselves as hapless victims in a milieu governed by several uncontrollable variables – they perceptively and meaningfully discussed various contributory factors for the same. There were several instances of candid self-criticism as well. Being closest to the ground in the judicial hierarchy, their considered views on the inadequacies of various laws and procedures and the frequent abuse of the courts by lawyers as well as litigants had the persuasive weight of close observations and everyday personal experiences – which they felt found no audience in the upper echelons of the judicial leadership.

Apart from being unable to inform the judicial leadership about the several issues that, in their view, debilitated the functioning of courts, they highlighted other instances of institutional apathy and one-sided top-down communication. They reported that they often remained unaware of the latest amendments in laws and regulations, as the provincial law department failed to update them on a timely basis. They also divulged that the district court law libraries were in an abysmal shape. Many of the interviewed judges also criticized the judicial leadership's single-minded focus on boosting case disposals and its adverse implications for the quality of judgments. There were no incentives, they reported, for the quality of output. As a matter of fact, they complained that there were no quality checks in place to distinguish the more competent judges from the

[98] Interviews with Mr. Anwar Ali, District Public Prosecutor Multan, June 30, 2010 and Mr. Amjad Shoaib Khan Tarin, Deputy District Officer Revenue (DDO(R)), June 30, 2010 further pointed out the absence of any pre-service and in-service training for prosecutors and revenue court judges; the lack of access to any foreign training; and specifically in the case of the newly introduced independent prosecution service, a complete lack of cooperation from the police and judiciary to allow it to perform its functions. They also pointed out the coercive use of legal gaps by the lawyers, rampant frivolous litigation, double booking by lawyers – a common practice used by lawyers to seek adjournments – and the lawyers' intimidation of judicial officers due to weak disciplinary and ethical regulation by the legal bars, as well as the equally weak penalty structure under the law for the judges to discipline recalcitrant lawyers. As a consequence, it was not uncommon, according to them, for case files to altogether disappear due to bribes, as well as the lawyers seeking interminable adjournments in their cases.

rest, such as a determination of the number of district court decisions that were appealed against and overruled. The sole injunction from the top, according to the interviewees, was to decide the maximum number of cases and meet unrealistic monthly targets. This, they thought, was highly untenable given the various problems and constraints beleaguering the legal/court system, which they were in any case discouraged from discussing. The upshot, according to the interviewees, was that the existing laws and procedures were dysfunctional and outdated in several important ways. Without meaningful law reform, justice would remain inaccessible to the common litigant and the legal system would continue to be abused.

Swat: cosmetic Islam, speedy justice, and beyond

Travelling north from the dusty hot plains, the lush mango groves and the timeless citadel cities of Southern Punjab to the ancient, lush, and commercially vibrant valley of Swat also entails a drastic jump from the mainstream Pakistani legal system to PATA – a distinctively governed area under special laws and regulatory mechanisms.[99] Before the Government of Pakistan introduced its special administration in Swat, it had been historically governed by a local ruler (known as the *Akhunzada*

[99] Although constitutionally part of Pakistan, PATA is subject to a separate system of governance. Article 246 of the Constitution of the Islamic Republic of Pakistan 1973 defines the geographical scope of the tribal areas and Art. 247 sets out the governance arrangement. Article 246(b)(i) defines PATA areas in KP to include: "The districts of Chitral, Dir and Swat (which includes Kalam) [the Tribal area in Kohistan district] Malakand Protected Area, the Tribal Area adjoining [Mansehra] district and the former State of Amb." Art. 247(1) provides: "[T]he executive authority of a Province shall extend to the Provincially Administered Tribal Areas therein." Art. 247(2) reads: "The President may, from time to time, give such directions to the Governor of a Province relating to the whole or any part of the Tribal Area within the Province as he may deem necessary, and the Governor shall, in the exercise of his functions under this Article, comply with such directions." Art. 247(3) provides: "[N]o Act of [Majlis-e-Shoora (Parliament)] or a Provincial Assembly shall apply to a Provincially Administered Tribal Area, or any part thereof, unless the Governor of the Province in which the Tribal Area is situated, with the approval of the President, so directs; and in giving such direction with respect to any law … the Governor, may direct that the law shall, in its application to a Tribal Area, or to a specified part thereof, have effect subject to such exceptions and modifications as may be specified in the direction." Furthermore, Art. 247(4) provides: "Notwithstanding anything contained in the Constitution … [T]he Governor of a Province, with prior approval of the President, may, with respect to any matter within the legislative competence of the Provincial Assembly make regulations for peace and good government of a Provincially Administered Tribal Area or any part thereof, situated in the Province." Thus, federal and provincial laws have no applicability in

or the *Akhund* of Swat; subsequently the title changed to the *Wali* of Swat). The *Wali* dispensed largely discretionary but affordable and quick justice by employing a tolerant amalgamation of Islamic as well as local customary law.[100] In the post-Wali years, several federal and provincial laws have been extended to, and at times withdrawn from, PATA.[101]

The increasingly violent events in Swat and adjoining areas due to a local Taliban-led insurgency came to the international attention during the first half of 2009. They demonstrated the combustible potential of law reform as a felt issue, as well as a convenient rallying cry for aspirants to political power with no qualms about using brutal force. The slogan of choice for the Taliban in Swat was that their brand of Islamic *Sharia* would provide quick and cheap justice, which the system that it meant to replace had utterly failed to do. While being reticent about the substantive ethos and facets of this *Sharia*, the Taliban put a premium on the "speed" of justice. The outbreak of violence was in likelihood a genuine manifestation of the growing popular disgruntlement with the existing administrative and judicial system. There is less evidence that it denoted a deeper local support for the ostensibly increasing attractiveness of the Taliban brand of Islamic governance in certain parts of FATA, KP, and adjacent Afghanistan. This may be the reason why the substantive elements of the Taliban brand of Islam remained largely unarticulated

PATA unless the Governor of the Province extends their operation under Art. 247 of the Constitution. In 2009, the Governor of KP issued the NAR. The NAR is the latest in a series of justice system regulations issued for this area since 1975. It is evident that local pressures for introduction of a more Islamic law have influenced some of this legislation, although in all instances the Islamization is solely reflected in the official nomenclature rather than in any distinctively Islamic features of the law. These regulations, in their order of issuance, are provided below:

(i) the PATA Criminal Law (Special Provisions) Regulation 1975 and the PATA Civil Procedure (Special Provisions) Regulation 1975;
(ii) the Provincially Administered Tribal Areas (Nifaz-e-Nizam-e-Shariah) Regulation 1994;
(iii) the Shariah Nizam-e-Adl Regulation 1999; and
(iv) the Shariah Nizam-e-Adl Regulation 2009 (NAR).

[100] For an interesting and nostalgic description of his local justice, see an interview with the last *Wali* of Swat in C. Lamb, "The *Wali* of Swat Mourns His Lost Land," *The Sunday Times*, May 24, 2009. See also the illuminating memoirs of the last *Wali* of Swat that shed light on important aspects of the political and social history of the valley in F. Barth, *The Last Wali of Swat* (Bangkok: White Orchid Press, 2008).

[101] For a compilation of the various laws currently applicable to the Tribal Areas, see I. Ali, *Laws Extended to the Tribal Areas with Jirga Laws*, 3rd edn. (Lahore: Al-Shams Law House, 2009).

and vague. Furthermore, since the Pakistani military operation in Swat in early 2010 to wipe out Taliban networks from the area, reports from the ground largely reveal a guardedly relieved populace. Thus, one is persuaded that many of them may have been coerced into subservience to the Taliban's power-grabbing and expansionist agendas.[102]

The government responded swiftly with the Nizam-e-Adl Regulation, 2009 (NAR).[103] Before the situation got further out of hand and a military operation was ultimately unleashed, the battle lines were largely drawn around the structure and contours of this governmental proposal for meaningful legal and judicial reform. It has persisted even after the insurgency was militarily defeated. This was not a unique piece of legislation and in many ways drew upon earlier and eventually ineffective regulatory formulae for the region.[104] Motivated by the immediate imperatives of appeasement, the controversial and hastily generated law proceeded with the assumptions that the Taliban-led insurgency was essentially galvanized by two underlying grievances: the existing legal regime in the area was both painfully slow and insufficiently Islamic. The NAR was put forward as the model of a quicker and more Islamic legal framework, and as a practical demonstration of the state's sensitivity to the sentiments of the Swati public and their largely self-appointed Taliban spokespersons. The author had the opportunity to visit Swat soon after the Taliban insurgency had been more or less routed, although the area was still racked by sporadic violence. The visit offered a first-hand opportunity to observe the operation of the NAR in the post-insurgency era.

[102] See, e.g. the following Pakistani news reports: A. Yusufzai, "There is life after Taliban But Fear Lingers," *IPS NEWS*, October 14, 2009, http://ipsnews.net/news.asp?idnews=48856; and A. I. Khan, "Clearing Misconceptions on Pakistan's War in Swat," June 4, 2009, www.counterpunch.org/khan06042009.html.

[103] See the contents of the Shariah Nizam-e-Adl (Islamic Justice System) Regulation 2009 (NAR) at www.dailytimes.com.pk/default.asp?page=2009\04\15\story_15-4-2009_pg7_51. The legislative initiative, which literally means "system of justice," was proclaimed by the government as an endeavor to bring peace to the region, and to also address local demands for making justice delivery more expeditious.

[104] The NAR is the latest of a series of justice system regulations issued in the area since 1975. In order of issuance, these regulations are as follows: (i) The PATA Criminal Law (Special Provisions) Regulation 1975 and the PATA Civil Procedure (Special Provisions) Regulation 1975; (ii) The Provincially Administered Tribal Areas (Nifaz-e-Nizam-e-Shariah) Regulation 1994; (iii) The Shari-Nizam-e-Adl Regulation 1999; and, finally, (iv) the NAR. For a detailed critical evaluation of the events and factors leading to the introduction of NAR, see O. Siddique, "The Other Pakistan: Special Laws, Diminished Citizenship and the Gathering Storm" (December 5, 2012), at http://ssrn.com/abstract=2185535 or http://dx.doi.org/10.2139/ssrn.2185535.

The NAR – which was also, as discussed earlier, the predominant focus of the contemporaneous USAID Assessment – essentially comprises a new set of court rules and procedural relaxations to expedite the time taken for decisions in civil and criminal cases, as well as certain penalties and accountability mechanisms with regard to delay. It has nothing to do with *Shariah* other than in name, despite the USAID's fascination otherwise.[105] As before, the judges appointed to function in Swat and elsewhere in the Malakand Division in the post-NAR era belong to the provincial district judiciary – they merely have new "Islamic sounding" Arabic titles.[106] Perceiving long delays in the adjudication and decision of cases under the preceding system to be the main political challenge for maintaining the writ of the state, immediate steps for delay reduction have, therefore, been the main focus of law reform in the area. Apart

[105] The NAR sets out certain quantitative performance standards and enhances the mechanisms for judicial accountability of district court judges. Apart from changing the court nomenclature by allocating Islamic names and titles, most significantly, it provides time frames for case disposal – 6 and 4 months for civil and criminal matters respectively. Under the NAR, Judicial Officers/Qazis and executive magistrates must report the cause and reasons for any delay beyond the NAR-prescribed periods to the District Judge/Zilla Qazi or the District Magistrate, or the presiding officer of the principal seat of Dar-ul-Qaza, who may then issue suitable directions. Furthermore, if the presiding officer of a court comes to the opinion that any delaying tactics are being used, he may impose a cost on the recalcitrant party. If, on the other hand, the Qazi or the Executive Magistrate is found to be at fault, the relevant presiding officer may issue a "letter of displeasure" that may lead to an adverse entry in the service record of such individual. The presiding officer may also recommend disciplinary action for the latter. The NAR also mandates that no adjournment can be granted in a case unless the court is satisfied that it is unavoidable and is subject to costs. The restriction on adjournments is meant to ensure that the Judge/Qazi has more effective control over the pace of legal proceedings in court. The NAR also allows flexibility to the judges in the application of civil and criminal procedure in order to ensure expeditious decision in cases. Further, the NAR links the decision of the allocation of a higher number of judges in courts with the level of their case pendency, "to ensure expeditious dispensation of justice within the prescribed time schedule." To facilitate litigants, the NAR also provides that the language of the court may be English, Urdu, or Pashto. See the NAR.

[106] For instance, see the new designations of district court judges in the Swat District as well as in the rest of the areas in which the NAR has come into play.

Former office/designation	New Islamic office/designation
Civil Judge/Judicial Magistrate	Illaqa Qazi
Senior Civil Judge	Aala Illaqa Qazi
Additional District/Sessions Judge	Izafi Zilla Qazi
District and Sessions Judge	Zilla Qazi

from introducing the NAR, at the time of writing, the Peshawar High Court had sent several additional judges to the area (mostly new appointees) in order to boost the capacity of the local judiciary to tackle the case backlogs.[107] The administrative decision-makers interviewed in the Peshawar High Court were quite happy with what they described as a positive public reaction to the NAR and a tangible resulting decrease in case pendency.[108] Whether this euphoria was sustainable and shared by the judicial officers functioning on the ground in the area required an evaluation of the actual situation in the district courts, which now follows.

The Swat district court complex is in an adequately operational condition, though cramped and overcrowded like other district courts in the country. However, the court infrastructure in the rest of the district has undergone serious damage due to the clash between the Taliban and the army.[109] As opposed to the administrative spokespersons at the Peshawar High Court, when one spoke to the district judiciary in Swat about the impact of the NAR, the responses were considerably mixed and at times far less enthusiastic. The District and Sessions Court Judge Swat, who is the administrative head for the district judiciary, for one agreed with the

[107] Interview with Syed Mussaddiq Hussain Gilani, Registrar Peshawar High Court, June 30, 2010. According to him: "Give me an endless supply of judges in any part of Pakistan, and the case backlog will go away. However, obviously that cannot happen due to budgetary constraints. In the case of Malakand, we sent extra judges from other parts of the province and as a result the case backlog has come down." However, he agreed that this was obviously unsustainable and that the real test of the NAR would come when these extra judges were withdrawn. In his view, the people had so far reacted very positively to the NAR as it had effectively addressed the bottlenecks in the previous system.

[108] Interview with Syed Mussaddiq Hussain Gilani, June 30, 2010.

[109] For instance, at the time of writing, the Tehsil Court Complex in Matta Tehsil, which saw a significant level of action between the Taliban and the army, was badly affected and still unsafe for conducting everyday work, or for that matter even a visit. Hence the presiding officer of that court was actually interviewed in Saidu Sharif – the more secure, army-protected capital city of Swat. Interview with Mr. Sajid Khan, Additional District Judge, Matta, July 8, 2010. Apart from the judges, various members of the court staff were also interviewed who said that the district judiciary continuously faced the problems of poor facilities, inadequate infrastructure, lack of opportunities for training, weak performance incentives, etc. – and yet there had been no improvement in these domains despite the rhetoric at the top in the wake of the Taliban uprising in Swat and also the various donor-driven programs such as the AJP. Interviews were conducted with two reader assistants, a stenographer and two public prosecutors (the latter facing the same issues of lack of facilities, training, and cooperation reported by their counterparts in Multan).

decision-makers in the Peshawar High Court that the introduction of the NAR time lines for deciding civil and criminal cases, as well as the supply of additional judges from the Peshawar High Court, had shortened case proceedings and accelerated case disposals.[110] However, he stated that the continuing lack of facilities and infrastructure constraints posed many impediments to the smooth functioning of the courts.[111] He conceded that the NAR had furnished the judges with a real power to resist delaying tactics by the lawyers. At the same time, he was also critical of the NAR as he felt that it had been introduced in a hurry – the rushed introduction not only meant that it had several lacunae and ambiguities, but also that it once again enshrined a "special" legal regime for Swat and the rest of PATA. This, he said, was in violation of earlier Supreme Court judgments that had paved the way for mainstreaming the law in PATA in order to bring it on a par with the rest of the country.[112] While he praised the initial dent made by the NAR on delaying tactics and case backlog, he was very careful to take a position on the prospect of a sustainable positive impact.[113] The NAR, he stated, was essentially a set of broad guidelines and instructions that allowed judges the discretion to

[110] Interview with District and Sessions Judge, Swat, July 7, 2010. According to the judge, there were forty-seven judicial officers in the Swat District at the time of the interview.

[111] Interview with District and Sessions Judge, Swat, July 7, 2010.

[112] Interview with District and Sessions Judge, Swat, July 7, 2010. His main criticism was that the earlier system of district magistracy continued its autonomous operation in PATA whereby certain kinds of cases were decided by the district magistrates under local and special laws, despite the fact that such adjudicative powers had been taken away from the district magistracy elsewhere in the country and assigned instead to the judiciary. The latter, he said, reflected the government's decision to abide by several Supreme Court judgments that had mandated a complete separation of powers between the executive and the judiciary. This theme, also discussed in Ch. 5, is an area of constant attrition between the judiciary and the district magistracy and hence the District and Sessions judge's comments were not unsurprising as they stemmed from a certain entrenched institutional position on the debate (ibid.).

[113] Interview with District and Sessions Judge, Swat, July 7, 2010. The other main challenges faced by the district judiciary, according to the District and Sessions Judge, were budgetary constraints, the slow and cumbersome process of the release of funds by the High Courts to the District Courts, poor infrastructure, and inadequate training opportunities for judges, especially for training abroad. As far as the training of court staff was concerned, the District and Sessions Judge thought that given the many other more serious challenges faced by the district judiciary, the decision of the justice sector reform donors to focus on the training of court staff was a naive "welfare state idea." As to USAID's initiative for court process reforms for efficient case disposal through the introduction of better management techniques, he was not at all enthused. His view was that more effective case disposal was ultimately a function of personal commitment, dedication, and being God fearing.

collapse the civil and criminal procedure in order to fit it into the tight new time frames mandated under the NAR.[114] This, however, was not always possible or fair according to him, as the courts often came across complex cases that required additional time for fact-finding, evaluation of evidence, hearing all of the pertinent parties, and just decision-making.[115] He was also explicit in declaring that the NAR was Islamic in name only, and that it was no more or less Islamic than the laws in the rest of Pakistan.[116] It also emerged in the conversation that the framework provided by the NAR for appeals from local district court decisions, i.e. essentially appeals to specified benches of the High Court and Supreme Court (now referred to by new Arabic names – the *Dar-ul-Qaza* and *Dar-ul-Dar-ul-Qaza*), was as yet not in place.[117] Furthermore, the District and Sessions judge honestly conceded that although the constant pressure from the judicial leadership to clear the backlog of cases had resulted in the district judges having "disposed of" many of the cases before them, they had mostly not yet written down the actual judgments.[118] In other words, he implied that it was only when these judgments were written and became public; when they were accepted or appealed against; and, if appealed against, when the appeals were either upheld or struck down by the appellate courts, that the effectiveness of and the level of public satisfaction with the NAR's expedited case disposal regime would truly emerge.

[114] Interview with District and Sessions Judge, Swat, July 7, 2010. According to him, although the standard civil and criminal procedure codes of the country were still in place in Swat and other areas comprising PATA, the NAR had brought about a situation whereby the various steps and time lines therein were no longer binding. It was also not strictly accurate, according to him, to describe the NAR as based on *Sharia* given that the former put forward specific time lines for deciding cases. The *Sharia*, he said, provided no time lines for deciding cases, but essentially furnished the method for making laws.

[115] Interview with District and Sessions Judge, Swat, July 7, 2010.

[116] Interview with District and Sessions Judge, Swat, July 7, 2010. The interviewed judge had received relatively extensive training in *Sharia* law, having undertaken the Dars-e-Nizami (a traditional course in Islamic jurisprudence) and having also attended short *Sharia* courses at the Federal Judicial Academy and at the Al Azhar University in Cairo. The interviewee was very uncomfortable with the categorization of the NAR as Islamic as opposed to the laws in the rest of the country and felt that neither were in violation of the *Sharia* and hence particularly different on the litmus test of Islamic/non-Islamic. He was firmly of the view that the NAR was titled as such purely because of political reasons in order to diffuse the Taliban militancy, which had been triggered due to successive years of bad governance in the area, as well as the government's strategic and political use of various radical elements in the past.

[117] Interview with District and Sessions Judge, Swat, July 7, 2010.

[118] Interview with District and Sessions Judge, Swat, July 7, 2010.

The main operational shortcoming of the NAR, as also stressed by many of the interviewed district judges, is that it does not exactly prescribe how the district judiciary in PATA is expected to collapse the complex and elaborate civil and criminal procedures in order to fit them into the tight confines of the NAR-mandated case disposal deadlines. There was, as almost always, no deep and participatory engagement leading to the promulgation of the NAR – which attempted to pursue efficiency without jeopardizing the various well-known imperatives of due process and natural justice, including, inter alia, adequate opportunities for the contesting parties to meaningfully plead their cases and for the judges to undertake a proper evaluation of the facts and evidence.[119] The NAR is simply silent, however, on how an optimal balance is to be struck between speed and due process. As a consequence, it leaves tremendous discretion to the judges and thereby increases the possibility of inconsistency of court practice as well as flawed trials.[120] This in turn can invariably lead to escalating appeals (and hence further delay) and additional burdens for the higher courts – and also for the district courts if the appellate courts decide to remand the cases back to them.[121] The NAR is thus a good example of hasty legislation that aims to superficially (and one would venture to add, temporarily) address certain immediate and politically cumbersome symptoms of an inefficient and overworked judicial system. Since it sidestepped any serious engagement with PATA's historical experience with similar ad hoc laws, its rapidly

[119] This point was emphasized in the interviews with: Mr. M. Asim Imam, Anti-Terrorist Court Judge, Swat, July 6, 2010; District and Sessions Judge, Swat, July 7, 2010; and Mr. Sajid Khan, July 8, 2010.

[120] On being probed, the interviewed judges spoke at length about the many problems triggered by the NAR's short time frames for deciding civil and criminal cases. These included, inter alia, the problems of ensuring the availability of relevant witnesses and adequately recording evidence; the excessive focus on case disposals contributing to the growing gap between "disposed" cases and actual "decided" cases in view of written judgments; and growing complaints from lawyers and even some litigants about their dissatisfaction with the excessively rushed pace of court proceedings. The interviewed judges were of the view that much greater legislative attention was required in order to revisit the legal problems of the people in Swat and the rest of Malakand. The mere collapsing of the procedural law or mandating broad and informal practice directions was simply not enough. They also suggested various areas that required concrete procedural law reform, such as the introduction of additional formal disclosure requirements at early stages in the trial in order to weed out frivolous litigation. (Interviews with: Mr. M. Asim Imam, July 6, 2010; District and Sessions Judge, Swat, July 7, 2010; and Mr. Sajid Khan, July 8, 2010.)

[121] Ibid.

changing context that divulges deep-seated popular resentment against various aspects of the operation of the legal system and the valuable feedback from the actual operators of the district court system as to the nature of problems characterizing the legal and court system, it essentially offers the mere facade of reform in place of a real solution. It is a facade that constitutes some Islamic rhetoric and a set of blunderbuss directives introducing some broad deadlines and targets. One may be persuaded to concede that the NAR's attempt to rationalize a cumbersome and delay-inducing procedure and to give more power to the courts in order to deter delaying tactics are generically steps in the right direction. However, on available evidence, there has been no rigorous engagement with these reform themes – this in turn is likely to spawn a whole host of issues about which the interviewed judges warned.[122]

The most candidly critical and contextually nuanced assessment of the NAR came from the person arguably conducting one of the most dangerous jobs in Swat, if not the country, i.e. the Anti-Terrorist Court Judge for the entire Malakand Division.[123] His assessment laid bare the inadequacies of the government's reform engagement with the ongoing political and legal challenges in PATA. Especially bearing in mind that

[122] For instance, the NAR is blind to the relative nature and complexity of the different kinds of cases before the district courts and endeavors to mechanically fit all of them within its tight time frames, instead of being cognizant that delay reduction for different types of cases may require multiple case tracks with independent requirements and mandates. There also seems to be no recognition of the particular kind of litigation that takes place in Swat. This vital contextual dimension should ideally inform any special reform prescriptions meant to address immediate violent dissatisfaction, especially since the vehicle for reform can be ad hoc and more expeditiously context-specific. A review of the Swat District court data and interviews with the court staff revealed that in terms of civil cases, almost 70 percent of the cases before the courts were land cases. In comparison, in the criminal domain around 40 percent of the cases pertained to sexual offences, while the remainder were murder cases (once again the majority of these stemming from long-standing land disputes). However, there has been no attempt in the NAR or thereafter to focus on these specific areas of constant attrition and contestation, and particularly the local land law regime. See interview with Mr. Hamid Iqbal, Superintendent to Court of District and Sessions Judge, Swat, July 9, 2010. The interviewee pointed out various gaps in the laws and regulations as well as their discordance with local practices and ground realities. These included, inter alia: the fact that certain areas in PATA had still not undergone formal land settlement, which raised a special set of problems; women historically not being given their legal share in land also led to multiple disputes and crime; and the experience-based observation that most land disputes were linked to inadequate land record keeping, the corruption of *patwaris* or land record keepers, and various other shortcomings in the land ownership and transfer regime.

[123] Interview with Mr. M. Asim Imam, July 6, 2010.

the NAR was introduced in the wake of a very violent reaction to the prevalent legal system, in his view, various critical areas of reform starkly stood out for their omission. For instance, the judge confirmed that there were two army detention centers operating in the district, where the ordinary criminal laws applicable in the area had no penetration. Not only was it legally unclear as to under what law the detainees had been arrested and detained – although a legal cover could be constructed owing to the extraordinary circumstances in the area and the consequent special ambit of the government-approved army action – importantly, there were no mechanisms in place for handing over these detainees to the police and formally bringing them to a criminal trial. The status quo, in his view, posed serious risks to the sustainability of peace and the public confidence in the criminal justice system.[124]

When asked how he generally managed to adhere to the requirements of the criminal procedure given his vast territorial jurisdiction, the spate of terrorist activity in the area, and the much-reduced time frame for a criminal trial mandated by the NAR, the judge admitted that it was a constant struggle. Given the aforementioned challenges, the biggest problems that he faced in his work – much as the inadequacy of his security, staff, facilities, and equipment support were also evident[125] – were

[124] Interview with Mr. M. Asim Imam, July 6, 2010. These were the army detention centers at Batkhaila and Fiza Garh. The army confined and investigated the "most hardened militants" at these two facilities. Two anti-terrorist court judges were also present at these facilities. However, it was legally impossible for them to function at these centers, as the centers were outside their legal territorial jurisdictions – hence they were essentially conducting jail trials. Detention center inmates were not presented before any civilian courts or handed over to the police. According to informal sources, the detainees were categorized as "Black," "Grey," or "White" by the army, according to the culpability attached to them by army investigations: they accordingly met different fates. There was no indication of any formal evidence collection by the army, and also no certainty as to its appreciation of how a criminal trial took place. A rehabilitation center had been set up for underage militants – called *Sabawoon* (which means "Morning Light" in Pushto) – but it was not easy to get the army to release them for induction into this center. There were several instances where the army presence in the area had precluded the engagement of the locals in traditional vocations such as stone-crushing, etc., which persuaded or forced some of them to return to militancy. The army's ongoing presence in the area was a necessity of sorts. However, the continuing lack of civilian and army attention to developing a framework for the army to hand over detainees for criminal trials under the law posed the threat of disenchanting many locals, including innocent detainees and their families, potentially influencing them to turn to militancy (ibid.).

[125] In a subsequent discussion, the judge also shared that the judicial leadership had not undertaken the necessary steps to provide adequate security to the judges in areas such as Swat. Financial incentives, risk allowances, housing, transportation, timely

the ones posed by a weak and underdeveloped evidentiary law regime that did not allow an appreciation of circumstantial evidence, so essential otherwise in terrorism cases.[126] Furthermore, according to him, additional problems germinated from the fact that various important amendments introduced to the country's anti-terrorism laws had not been extended to FATA and PATA – yet another example of the complications spawning from the multiplicity of legal regimes in the country and the slow legislative, executive, and judicial responses to fast-changing social, political, and security situations.[127] While certain new administrative arrangements – whereby the provincial finance departments had relinquished the responsibility for managing the court budgets to the High Courts – had been hailed as a step toward greater judicial autonomy by the upper echelons of the judiciary, the judge at ground level had a very different take on this. He identified several new obstructions to the smooth and timely outflow of funds from the High Courts to the district judiciary, owing to the former's lack of experience in financial management, as well as the domineering attitude of the judicial bureaucracies toward the district judiciary – an attitude that manifested itself in additional ways.[128]

procurement and availability of good-quality court equipment, the numerical strength and training of the court staff, etc. were additional areas of neglect. The district judiciary had negligible access to any training abroad as well as differential access to training at local academies. It was important for judges working in special legal regimes such as anti-terrorism law to be exposed to special training programs in anti-terrorism-related courses, collection of evidence, detention rules, and trial management; it was also highly necessary to introduce victim assistance and witness protection programs. (Interview with Mr. M. Asim Imam, July 6, 2010.)

[126] Interview with Mr. M. Asim Imam, July 6, 2010. The judge discussed at length the various aspects of the law of evidence, which needed urgent revisiting and meaningful amendment. He stressed that new situations like armed militancy and suicide bombings threw up important and urgent questions about, inter alia, the legal age for crime, the evidence required to get just convictions for new kinds of crime, and the legal definitions of "complicity in crime" as well as of "aiding and abetting," etc. Yet, there seemed to be no real recognition of the actual challenges being faced by the police and law-enforcement agencies in such troubled areas, and hence no concomitant changes in the strategy, laws, and regulations (ibid.).

[127] Interview with Mr. M. Asim Imam, July 6, 2010. He further pointed out that anti-terrorism trials, not unlike other criminal trials, were acutely hampered by weak police investigations. This in turn was a function of lack of training, equipment, regulations, and the scandalous inadequacy of reliable forensics facilities – the entire province had only one such facility.

[128] Interview with Mr. M. Asim Imam, July 6, 2010. According to the interviewee, it was imprudent for the High Courts to take up budget-making and financial responsibilities,

In conclusion, the several judges and court staff interviewed in Swat attributed the Taliban-led militancy to a series of ineffective regulatory frameworks for PATA that had created and fanned local resentment against the government and the legal/court systems. They were of the view – and this is remarkably bold feedback coming from state functionaries – that these regulatory frameworks had always been blind to the area's special history, its local context, and the factors that contributed to popular dissatisfaction and resentment with the legal/court system. Not the least of the main reasons for their unpopularity was that they were the output of non-participatory policy discussions and law-making. This made them, according to the interviewees, ideal targets for the convergence of multiple local and entrenched social, political, and economic resentments.[129] To the interviewees, there was nothing novel or particularly promising about the NAR solution in terms of its potential to

given that the chief justices and the court administration hierarchies were already overburdened. He also emphasized that the anti-terrorist courts covered very large geographical areas and faced excessively high volumes of cases. In many such cases, the accused managed to secure bails from the High Courts. Thus, there was a need for greater dialogue and communication between different levels of the judiciary in order to rationalize the area of bail – the High Courts did not always seem to be cognizant of the ground realities faced by the district courts. Repeat offenders and highly dangerous individuals seemed to get routinely bailed out. Another area requiring urgent attention was the much-needed rationalization between the anti-terrorist laws and the laws for the protection of juveniles. As things stood, confusion and contradiction between competing policy imperatives prevailed in this area. However, there was simply no dialogue on this between the different levels of judiciary. (Ibid.)

[129] Interview with Mr. M. Asim Imam, July 6, 2010. Contrary to popular reporting, the Taliban-led resentment was not solely caused by dissatisfaction with the court system and its delays – the delays were no different from elsewhere in the country. In order to understand the deeper underlying reasons, one needs to probe deeper and wider. Some of the main reasons behind the Taliban upsurge included: the history and backdrop of a strong centralized state under the *Wali* of Swat; various weak, poorly visualized, and ineffective state mandated administrative systems; the unbridled allocation and use of powers by the state's administrative machinery under different regulatory regimes over the years; the co-option and strategic use of local radical elements by the state during different periods with the resulting weakening of the writ of the state; and elements of a class struggle emerging from land and resource distribution patterns in the area. These were essentially issues that required closer political and policy examination, negotiation, and solutions, and could not simply be remedied by enforcing tight time lines for case disposal in courts – which was just one relatively minor dimension of the larger problem. The ineffective maintenance of law and order in the area had also contributed to the sustainability of safe havens for criminal elements, which were a strong component within the Taliban, and had their own vested interests in promoting anarchy. In the past, certain members of the local administration had also, at times, extended strong ideological support to the Taliban or were hand in glove with the criminal elements, but had

address the complex challenges faced by the district judiciary in PATA. Under an Islamic veneer, it was, they felt, a largely ineffectual antidote for the recent violent challenge to the formal court-based legal system. Neither was it a substitute for deeper and more participatory political, policy, and legislative thinking. Hasty patchwork was bound to once again expose the gaping holes in the area's political, economic, administrative, and legal governance. Even in terms of dealing with delays, the interviewees stressed that the NAR did not systematically and meaningfully condense the civil and criminal codes in order to shorten the length of trials, while ensuring at the same time that the fundamental requirements of due process and a fair trial were met. It merely provided certain loose guidelines that led to a variety of interpretations and a high degree of variation in practice from court to court. Further, neither an improvement in infrastructure/facilities/resources nor the requisite clarity of direction and consequent deeper law reform had accompanied and supported the increasingly steep targets for monthly case disposals.[130]

Some of the judges specifically pointed out that the law of evidence, and the entire regime of criminal investigation, prosecution, and forensic testing capabilities were in dire need of modernization. They said that they also required advanced training for adjudicating the tremendous number of complex criminal cases generated by the rampant episodes of terrorism-related violence in the area. Highly problematic also, they said, was the phenomenon of the missing persons and the ambiguous status of terrorism- and Taliban-insurgency-related detainees being held by the army, with no mechanism in place to formally transfer them to the police and the criminal justice system. Apart from the grave possibilities of the miscarriage of justice, the status quo could also lead to aggravating local sentiments. Yet to the utter exclusion of these imperatives, the

evaded detection and accountability. (Interviews with Mr. M. Asim Imam, July 6, 2010; District and Sessions Judge, Swat, July 7, 2010; and Mr. Sajid Khan, July 8, 2010.)

[130] Interview with Mr. M. Asim Imam, July 6, 2010. According to him, there is nothing unique about the NAR. It is an old framework that has been tried again and again, i.e. an Islamic-sounding law that makes some piecemeal amendments to the court processes in order to bring about relative operational efficiency. The NAR and its predecessors were not the result of any rigorous policy deliberations: in the case of the NAR, it was the output of one senior bureaucrat in the provincial law department. The requirement in the NAR to conduct proceedings in Urdu was also onerous for judges trained in English. There was a growing recognition in the district judiciary that the hasty proceedings under the NAR would have serious quality of justice ramifications. At the same time, the judges felt that they needed more time to make sound decisions, as they did not want to be appealed against due to the inadequacy of their hastily delivered judgments (ibid.).

interviewees reported that the sole emphasis from the judicial leadership was on the quick disposal of cases. Meanwhile, the judges confessed that they found it very difficult to keep up with stiff case disposal targets. While case disposals had increased on paper, they admitted that it was simply impossible to reason and write the final decisions at such an accelerated pace. It was only once the decisions were actually written and a number of them potentially appealed against that one could objectively determine their quality as well as the nature of popular reception to the NAR-led quick justice. The interviewees displayed considerable uncertainty and anxiety about what the future held for the legal and court system in Swat.

Judging the judges: judicial insularity and the state of judicial training institutes in Pakistan

The previous sections examined the grassroots feedback from the lowest tier of courts in places as diverse as Multan and Swat. It underlined the existence of a gaping schism between the views and prescriptions of the district judiciary and administrative staff at one level and the priorities and horizons of judicial policy-making at another and more exalted level. One of the oft-discussed themes in this feedback was the access to quality training for district court judges and staff. It merits, therefore, to briefly evaluate the state of the Pakistani judicial training academies for the following reasons. First, due to the need to identify any existing positive correlations between the agendas of court efficiency reforms and judicial capacity building that have dominated the national reform agenda over the past decade-and-a-half, and the availability and quality of judicial training in the country – an area explicitly prioritized by the NJP and other recent policy statements by the judicial leadership. Second, such an assessment is further necessitated by the fact that the district judiciary interviewed in Multan and Swat – and also elsewhere in other interactions – vociferously complained about: the infrequent and differential access to any pre-service and in-service training; the qualitative inadequacy of such exposure; and the general aloofness of the judicial leadership to the district judiciary's capacity building and training needs. Third, such an evaluation would also act as a sensitive gauge for the revived post-Lawyers' Movement judiciary's demonstrated commitment to its own institutional development and reform, and its professional upgradation – especially given that the responsibility for ensuring adequate judicial training falls squarely within its own exclusive jurisdiction and

control – it is not susceptible to any real or perceived interference by any other state organ. Finally, the fact that, to date, there is no publicly available performance assessment of the various judicial training academies in the country requires that this gap be filled.[131]

The judicial training academies: institutional structure, leadership, and capacity

This section will provide a brief overview of the organizational structure, quality of leadership, and the faculty strengths of the five judicial training academies currently operating (or soon to be operational, at the time of writing) in Pakistan. This fact-finding exercise is based on: several interviews with district judges, as well as the administrative and academic managers and staff of the judicial academies; a close review of the annual calendars and the historical record of the training courses offered by the judicial academies, together with their respective curricula and syllabi; and a qualitative assessment of their respective faculties, their teaching and examination methodologies, and various other related aspects. The following are the main findings.[132]

Established in 1988, prior to the subsequent inception of various provincial judicial academies, the Federal Judicial Academy (FJA) was the sole organization catering to the training needs of all Pakistani district judicial officers and staff.[133] It remains the largest – in terms of

[131] The author has regularly engaged with the FJA during the course of his work as a reform policy advisor since 2004. This association proved to be very useful in assessing the historical evolution of FJA's capacity and quality, especially given the unavailability of any earlier evaluations and primary data that could assist in an objective evaluation, and also because the academies are generally very reticent about sharing any information with outsiders.

[132] The various judges interviewed in Swat and Multan were also asked about their exposure to and experience with training at the FJA or any relevant provincial judicial academies. Their collective feedback as the end-users of the training imparted at the judicial academies is incorporated into this analysis.

[133] The FJA was established in 1988 under a Resolution of the Government of Pakistan. A more formal and elaborate legal cover for its organization and functioning was provided through the Federal Judicial Academy Act 1997. For the official website of the FJA, see http://fja.gov.pk/. At present, the FJA caters to the training needs of judges from all over Pakistan, including the separately governed areas of Azad Jammu Kashmir and Gilgit-Baltistan (with the exception of certain types of pre-service training). The Sindh Judicial Academy (SJA) actually predates the FJA in terms of being granted an official status through an act of parliament – in that sense it is the first judicial academy to be set up in Pakistan. The SJA has provided pre-service training to district judges in Sindh since its inception in 1992.

its physical infrastructure and facilities – and the relatively better-funded judicial training academy in the country. In significant ways, the FJA's current capacity and performance provide telling insights into the general effectiveness and quality of judicial training in the country. The other four judicial training academies operate at the provincial level and are relatively nascent – barring the one operating in the province of Sindh. All of them trail behind the FJA according to the multiple performance indicators that are applicable in this context. As to its management structure, a Director General – a retired District and Sessions Court judge – heads the FJA. The two additional directors at the FJA are also retired District and Sessions Court judges.[134] Given that the FJA is an important federal institution with nationwide responsibilities, it is remarkable that the aforementioned comprised its entire permanent faculty and senior administrative staff. Thus, it predominantly relied on external resource persons for its course offerings. At the time of writing, there were five vacant posts for permanent faculty that had remained unoccupied for quite some time.[135]

The Punjab Judicial Academy (PJA) was set up as recently as in 2007.[136] It is also headed by a Director General – a retired judge of the Supreme Court. Another retired Supreme Court judge works as a consultant to the PJA. At the time of writing, the PJA had a permanent faculty of three, in addition to the two retired judges.[137] Thus, it also relied on external resource persons for its teaching responsibilities.[138] It transpired during the interviews that the PJA had found it very difficult to attract any additional qualified permanent faculty members – although any concrete steps toward a more effective future hiring strategy and

[134] Retired district judges have invariably occupied these posts. The incumbent Director General previously served as the Registrar of a High Court and also in the district judiciary.

[135] Interview with Mr. Parvaiz Ali Chawla, Director General FJA, Islamabad, July 9, 2010.

[136] For the text of the Punjab Judicial Academy Act 2007, see www.pap.gov.pk/index.php/acts/details/en/9/863. The PJA does not currently have a website. None of the senior leadership at the PJA seemed to be familiar with computer technology, although the PJA has a computer center that offers basic computer training to trainee judges.

[137] These include two retired judges of the district judiciary and a third faculty member with prior legal practice experience in the Middle East. The Punjab Judicial Academy Act 2007 entitles the Chief Justice of the Lahore High Court to appoint the Director General of the PJA and further mandates that the Director General shall be a person who has been a Judge of the Lahore High Court or District Judge of the Punjab. See Punjab Judicial Academy Act 2007, s. 9(4).

[138] Interview with Justice (Retd) Tanvir Ahmad Khan, Director General, Punjab Judicial Academy, June 2010.

related plans were not shared.[139] The PJA primarily imparts its training through invited speakers and lecturers who are retired judges, lawyers, and government officials from various departments.[140]

The Sindh Judicial Academy (SJA) was set up much earlier – in 1992 to be precise.[141] Its negligible institutional development, especially as compared to some of the newer judicial academies, stands out starkly, especially considering that it is the oldest formally enacted and functioning judicial training institute in the country.[142] The SJA is headed by a Director General who once again is a retired judge of the Supreme Court. He is assisted by a team that provides basic administrative and logistical services.[143] At the time of writing, it had no permanent faculty member or indeed any other senior administrative or program staff at the director level. This has been the sorry state of affairs at the SJA since its inception, barring a short period in the recent past.[144] It essentially translates into the fact that, since its establishment, the SJA has had no capacity for programmatic and curricular thinking and seems to rely completely on

[139] Interview with Mr. Fakhar-e-Hayat, Director (Administration) Punjab Judicial Academy, June 2010. Even so, it emerged that the Director General believed in a lean permanent faculty and wanted to maintain the outsourcing of teaching to external resource persons. See interview with Justice (Retd.) Tanvir Ahmad Khan, June 2010. The Director General stated that the PJA had been inviting the best available judges, lawyers, forensics experts, police investigation experts, jail staff, etc. in order to provide valuable insights to the trainees.

[140] Interview with Justice (Retd.) Tanvir Ahmad Khan, June 2010.

[141] The SJA was initially set up under a resolution of the Sindh High Court and later given legal cover under an Ordinance in 1993 and then a Provincial Act of Parliament in 1993. See Sindh Judicial Academy Act 1993.

[142] Interview with Mr. Khalid Tipu Rana, Additional District and Sessions Judge, Sukkur, and former faculty member SJA, July 2010.

[143] The Chief Justice of the Sindh High Court chairs the SJA's Board of Governors. The SJA's Director General, at the time of writing, was Justice (Retd.) Dr. Ghous Mohammad.

[144] Interview with Mr. Khalid Tipu Rana, July 2010. The present state of affairs at the SJA is actually a regression from the period spanning 2007–8 when the SJA had three permanent faculty members (in addition to the Director General), who specialized in civil procedure, criminal procedure, and curricular development. Their hiring transpired through the funding extended under the AJP. Some useful programmatic and curricular work was apparently undertaken during this period. However, once the AJP funding ran out, these positions became vacant and have not been filled to date (ibid.). The attempts made in 2006 for a revival of the SJP also seem to have faded away. These attempts are reflected in the analysis and hitherto unimplemented recommendations that are recorded in the following documents: "Sindh Judicial Academy: An Agenda for Reform" (Reforming SJA: Draft Working Paper, May 15, 2006); and the "Judicial Training Curriculum" (Sindh Judicial Academy, 2006).

the periodic directions and guidance from the Sindh High Court.[145] Furthermore, the SJA is completely dependent on any available external resource persons for providing the actual training – these are invariably retired judges from the High Court, the District Courts, and at times the Supreme Court.[146]

At the time of writing, Khyber-Pakhtunkhwa (KP) did not have an independent judicial training academy – although a project was underway in order to establish one on the model of the FJA.[147] The court officers at the Peshawar High Court pointed out that apart from standard training programs, the future KP Judicial Academy (KPJA) will especially focus on certain new areas of training, given the introduction of the NAR in the Malakand Division.[148] The enabling legislation for setting up the KPJA was still under consideration and an infrastructure-needs assessment was being undertaken.[149] No real thought had, however, been extended as yet to the vision, curriculum, management structure, teaching methodology, optimal size of the faculty, or its requisite qualifications for the new academy.[150]

The Baluchistan Judicial Academy (BJA) was launched as recently as in 2010, through a bill of the provincial assembly.[151] The BJA is also headed by a Director General, who is a retired judge of the district judiciary. He is assisted by a Senior Director, another retired district judge and, at the time of writing, the sole permanent faculty member at the BJA.[152] The BJA had not offered any training programs since its formal enactment. However, in the past, some training courses were irregularly offered under the auspices of the Baluchistan High Court.

[145] Interview with Mr. Khalid Tipu Rana, July 2010.
[146] Interview with Mr. Khalid Tipu Rana, July 2010.
[147] Interview with Mr. Niaz Muhammad Khan, Additional Registrar (Administration), Peshawar High court, June 30, 2010.
[148] Interview with Mr. Niaz Muhammad Khan, June 30, 2010. Also, interviews with Mr. Lodhi, Secretary to the Chief Justice, Peshawar High Court; and Syed Mussadiq Hussain Gilani, Registrar Peshawar High Court, both June 30, 2010.
[149] Ibid. [150] Ibid.
[151] The Baluchistan Assembly Bill 2010.
[152] Interview with Mr. Khalid Tipu Rana, July 2010. The interviews that were conducted in the courts in Baluchistan revealed that judges from the province had also had fairly irregular access to training at the FJA. Quite remarkably, there were judges in the Baluchistan district judiciary who had never received any pre-service or in-service training, even though they had been serving as judges for almost 15 years. An illustrative example was that there were no participants from Baluchistan in a recent *Sharia* training course offered by the International Islamic University, Islamabad, apparently due to an administrative oversight by the Baluchistan High Court (ibid.).

The BJA had been assigned some office space and support staff within the premises of the Baluchistan High Court.[153]

Of control and neglect

The two foremost themes that emerge from this review and the resulting feedback are those of "control" and "neglect." It is clearly evident that the judicial training academies are tightly controlled by the top judicial leadership – a fact which is palpably resented within the academies and believed to hinder operational autonomy, flexibility, and initiative.[154] The supervizing appellate court judges (and the various *ex-officio* government officials on the boards of these academies) are very busy people and can practically spare very little time to extend any meaningful guidance and supervision to the same. Furthermore, in most cases, they are unfamiliar and/or disengaged with the extent and nature of demand for training

[153] Interview with Mr. Khalid Tipu Rana, July 2010.

[154] The boards of these academies are dominated by judges and *ex-officio* civil servants. For instance, the nine-member Board of Governors for the FJA is headed by the Chief Justice of Pakistan and the additional members are the four Chief Justices of the High Courts; the Federal Minister for Law, Justice & Human Rights; the Secretary of the Ministry of Law, Justice & Parliamentary Affairs; the Attorney General of Pakistan; and the Director General of the FJA (see http://fja.gov.pk/). The PJA presents a similar picture. See Punjab Judicial Academy Act 2007, s. 6. The PJA Board has the following members: Chief Justice, Lahore High Court (Chairperson); two judges of the Lahore High Court nominated by the Chairperson; the Chairman, Planning & Development Board of the Government; the Registrar, Lahore High Court; the Additional Chief Secretary of the Government; the Secretary to the Government, Finance Department; the Secretary to the Government, Law, Parliamentary Affairs and Human Rights Department; the Principal, Punjab University, Law College, University of the Punjab, Lahore; a District and Sessions Judge nominated by the Chairperson; and the Director General, Punjab Judicial Academy. In the context of the SJA, a working paper that was prepared in 2006 to inform and galvanize reform of the SJA emphatically declared the domination of the SJA by the Sindh High Court as one of the main debilitating features of the former. It said: "Management of the Academy suffers from three major faults. First, the governing board does not appear to have an independent existence. Almost all members are either appointees of the Chief Justice or they depend on the Chief Justice for their careers. Dissenting opinion may therefore be very hard to air. Second, the Board does not include heads of other private educational and government training institutions in Karachi. Their presence would bring much-needed independence of opinion and also possibilities of synergies with their respective institutions. Third, sub-committees that could monitor the performance of the Academy on a daily basis do not exist. Two or three members of the Board who could devote more attention to the Academy may be nominated to this Committee." See Sindh Judicial Academy, "An Agenda for Reform" (Reforming SJA: Draft Working Paper, May 15, 2006).

from the district courts, and also uninformed about the latest developments in judicial training elsewhere in the world. Academics and a full-time trained faculty are largely absent from the boards and teaching staff of the various academies. They also do not figure in the future recruitment plans examined during the evaluation. The academies essentially operate on skeletal staffs that are predominantly preoccupied with administrative and operational functions. They seem to have little capacity, training, time, and, most importantly, autonomy, to focus on the training program structure, pedagogy, curricula, syllabi, and quality evaluation.[155] Most key decisions are actually taken by the largely disinterested boards. This translates into very weak quality control checks, erratic upgradation, and non-existent impact assessment of the training programs.[156]

"Control" manifests itself in a parochial manner in several ways – not only in terms of who occupies the boards of the academies and takes all the important decisions, but also in the selection of the administrative leadership and operating staff of the academies. As briefly mentioned above, the administrative leaders are always long-retired appellate court judges or recently retired District and Sessions Court judges – the operating staff invariably consist of retired members of the district

[155] At the FJA, for instance, the syllabus for any given course is essentially determined by the external instructor. The FJA has no mechanism, little time or expertise, and also negligible leverage for any qualitative overview, especially if the resource person/external instructor is a judge of an appellate court or a nominee of the same. See interviews with Mr. Alam Zeb Khan, Director Instructions (1); and Mr. Muhammad Ashraf Chaudhry, Director Instructions (2), FJA, Islamabad, both July 10, 2010.

[156] For instance, a designated judge of the Supreme Court is assigned to formulate the curriculum of the FJA. At the time of writing, a new curriculum was ostensibly being finalized, although the project had been delayed for quite some time. The delay reportedly stemmed from disagreements between the outgoing designated judge who was entrusted with curricular design and his successor designate. Two additional designated judges of the Supreme Court were meant to oversee the FJA's administration and budgeting functions. See interviews with Mr. Alam Zeb Khan and Mr. Muhammad Ashraf Chaudhry, July 10, 2010. Interviewees at the PJA also highlighted the fact that all the powers for finalizing curriculum and other academic decisions actually rested outside the PJA. See interviews with Mr. Arif Ali, Deputy Director, Punjab Judicial Academy, May 2010; and Justice (Retd.) Khalil-ur-Rahman Khan, Consultant, Punjab Judicial Academy, May 2010. At the SJA, pre-service and in-service training courses were offered as and when directed by the Sindh High Court. The relatively rare shorter duration seminars/workshops offered by the SJA were similarly demand driven and not the result of any institutional pre-planning based on an actual needs assessment or any faculty capacity building in key areas of instruction. See interview with Mr. Khalid Tipu Rana, July 2010.

judiciary. They themselves have never undergone any training for teaching or for that matter any training for running a judicial training institute and developing training programs and curricula. Thus, the actual training is hugely dependent on external resource persons – also mostly retired judges – who are of varying quality and differential experience, especially given that their appointment processes seem to be ad hoc and lack rigor.[157] Furthermore, the trainee judges are exposed to a very particular and ultimately limited and also rather limiting perspective on jurisprudence, laws, society, and the judicial function, which comes from a faculty almost exclusively comprising retired judges.[158] Additionally, the retired appellate court judges appointed to head the judicial training academies are often excessively rigid in their ways and too old to visualize, embrace, or galvanize any exciting initiatives.

The other important emerging theme from the evaluation is that of "neglect." There are very few opportunities for either the district court judges or the permanent teaching staff of the judicial academies to benefit from any foreign training and exposure, especially relative to the availability of such opportunities to government officials in other departments. There are also no formal and sustained international or regional collaborations that would allow the availability of foreign faculty for training judges or faculty in Pakistan, especially until such time that the indigenous capacity and supply of training expertise catches up to meet the growing training needs.[159] This is despite the fact that over the years many international academics and judges have informally expressed an interest in investing some time, at no cost, to conduct

[157] Interviews with Mr. Alam Zeb Khan and Mr. Muhammad Ashraf Chaudhry, July 10, 2010.

[158] The selection of the panel of teaching resource persons at the FJA is also undertaken, it emerged, by the aforementioned designated judge of the Supreme Court (with occasional input from the FJA). For the FJA to unilaterally identify any additional people for teaching and to then have them approved as resource persons by the Supreme Court was reported to be a very cumbersome and time-consuming process. See interviews with Mr. Alam Zeb Khan and Mr. Muhammad Ashraf Chaudhry, July 10, 2010; and also Justice (Retd.) Tanvir Ahmad Khan, May 2010. The FJA subscribes to a clear hierarchy in its selection of resource persons for teaching, which is unsurprisingly dominated by judges. See "The Annual Education Course Calendar 2010–11," FJA, Islamabad, Pakistan. The listed hierarchy is as follows: (i) retired and serving judges of the Supreme Court and High Courts; (ii) retired and serving judges of district judiciary; (iii) retired and serving officers of civil service of Pakistan; (iv) eminent jurists and lawyers; (v) professional experts; and (vi) NGOs. The situation is similar at the SJA. See Sindh High Court's Annual Reports 2002, 2003, 2004; and also interview with Mr. Khalid Tipu Rana, July 2010.

[159] See interviews with Mr. Alam Zeb Khan and Mr. Muhammad Ashraf Chaudhry, July 10, 2010.

short training-of-trainer courses in Pakistan. Although a few sporadic workshops and seminars have been offered in the past by some international donor organizations, they are by no means a regular or sustained feature.[160] Furthermore, although the mission statements of the Pakistani judicial academies profess a commitment to generating research in order to inform good teaching, on evidence there is no culture or space for any research to speak of. In the absence of any vibrant intellectual dialogue within the academies – or *any* dialogue for that matter – the instruction that is offered is largely jaded, formulaic, and not cognizant of the latest developments in both the substance of what is being taught and how it is being taught.

All of this translates into fairly undesirable cultural outcomes. The over-domination of the management and teaching at the judicial training academies by serving and retired judges may promote – and there was sufficient evidence on the ground to indicate that it does indeed promote – a kind of institutional inertness, a sense of vocational superiority and unaccountability, and a certain rigidity of approach.[161] It is not unrealistic to expect that an overreliance on the practitioners of what is widely considered to be a conservative and hierarchical profession can introduce a certain conservatism and jadedness to the teaching, and also a certain ossification and lack of introspection to the institutional environment. This is likely to inhibit critical free speech and discussion. One strong piece of evidence for this was the institutional resistance, and at times hostility, to the author's attempts to collect information and evaluate institutional output and quality by using independent benchmarks. Such attitudes were often on display during the interaction with the judicial

[160] See the FJA's "Annual Education Course Calendar 2010–11," which states that at half a day per judge per year, the amount of the judges' time dedicated to training in Pakistan is very low by international standards. The latter is almost a week per judge per year.

[161] For instance, no annual calendar/program of courses is apparently prepared at the SJA and none was available when sought. A 2006 SJA document outlines several problems at the same, highlighting a lack of commitment by the Sindh High Court to judicial training as well as governance weaknesses and lack of initiative. It further lists an acute shortage of full-time faculty and the consequent reliance on visiting faculty, outdated teaching methods, outdated curriculum, short duration of pre-service training, lack of importance attached to areas like written communication and general analytical and critical thinking ability, as well as the general grooming of judges, the absence of modern teaching aids, the trainees' lack of seriousness regarding training, the absence of exams, the absence of linkages between performance at the SJA with career incentives, the scant attention to in-service training, and the lack of funds committed to training. See SJA, "An Agenda for Reform" (Reforming SJA: draft Working Paper, May 15, 2006).

training academies. At the same time, there was negligible coordination between the academies, as admitted by the interviewees themselves, even though such coordination would be necessary to adopt common visions and standards and to help synergize the already meager human resources for the benefit of the upcoming academies.[162]

Training opportunities at the judicial academies are not planned and structured according to a systematic program that would ensure that all new appointees, as well as already serving judges, have equal access to training. The selection of judges for training is at the discretion of the High Courts. The feedback from the district court judges, as discussed earlier, was highly critical of the fairness and exhaustiveness of this selection process. They reported that some judges were continually selected for training, while others were never offered the opportunity. Furthermore, while there is a more or less universal access for new appointees to initial pre-service training, there are relatively very few courses offered for serving judges and judges operating special courts with specific and advanced training requirements.[163] These are of shorter duration – either 2-to-3-week or 2-to-3-day seminars/workshops.[164] The initial pre-service training courses are also of much shorter duration than what the judicial training academies would ideally like. The members of staff at the various academies were of the view that the judicial leadership attaches very little importance to training, and is unwilling to free up judges for longer training courses due to the heavy court workloads.[165] The training programs are not followed by any mandatory examination or other effective evaluative techniques. As a result, there is no gauge for

[162] Interviews with Mr. Alam Zeb Khan, July 10, 2010; and Justice (Retd.) Tanvir Ahmad Khan, May 2010.

[163] Ibid. Even the trainee feedback from Multan and Swat about these very short-term training engagements is not very positive in terms of their quality or relevance to actual challenges faced by them as judges and consequent training requirements.

[164] See the FJA's "Annual Education Course Calendar 2010–11." With the inception of the PJA, the pre-service training courses for newly inducted judges in Punjab are now being offered in Punjab, and that is also the case in Sindh, as stated above. The FJA, however, still trains the newly inducted district judges from the rest of the country. It transpired that to date there had been no formal final decision on the formula for allocation of judges for training among the FJA and provincial judicial academies. However, as a matter of accepted current practice, the FJA was not conducting pre-service training for Sindhi and Punjabi district judges.

[165] Ibid. PJA interviewees pointed out that the PJA wanted the newly inducted judges to undergo a 6-month training program, but they were only allowed to offer a 12-week training program by the Lahore High Court. See interviews with Justice (Retd.) Tanvir Ahmad Khan, May 2010; and Justice (Retd.) Khalil-ur-Rahman Khan, May 2010.

the actual quality of learning imparted to the trainees. Neither is there any incentive for the trainees to pursue greater rigor and achievement during the course of the training.[166]

On a positive note, the FJA's latest curricular documents have updated the curricula for its pre-service training courses. These curricula offer many new substantive as well as practice/vocational training courses, including several modules/themes on court management, financial management, case flow management, judgment writing, trial management, delay reduction, etc.[167] The situation, however, is far less satisfactory at the provincial judicial academies.[168]

[166] This is despite the fact that some of the laws governing the judicial training academies mandate such exams. See Punjab Judicial Academy Act 2007, s. 4(K). However, the Act and its governing rules do not mention whether failing an exam has any adverse career ramifications for the trainee.

[167] See the FJA's "Annual Education Course Calendar 2010–11," and also its "Curricula," 2nd edn (updated and revised) (Islamabad: FJA, 2009).

[168] In the case of the PJA, its governing law assigns the responsibility of curricular development to the PJA's board, which, as mentioned above, is dominated by judges, judicial appointees, and bureaucrats, with only one *ex officio* position for a university professor. The PJA curricula are the outcome of internal deliberations at the PJA as well as partially inspired by the FJA curricula. See interview with Justice (Retd.) Khalil-ur-Rahman Khan, May 2010. The PJA's curricula were not available online or in print. However, some very sketchy course outlines for freshly inducted civil judges, additional district and session judges, prosecutors, jail staff, and ADR training for lawyers were made available by the PJA for review. While they contain some of the themes in their FJA counterparts, they do not have an equally wide or exhaustive coverage. See "Course Outlines for Newly Recruited Civil Judges Cum Magistrates, Additional District & Sessions Judges, Probationer Civil Judges Cum Magistrates, Jail Superintendents, Prosecutors, and Lawyers" (PJA, 2010). The shorter training courses offered by the PJA are not pre-designed. They materialize as and when requested by the Government of Punjab: see interview with Justice (Retd.) Tanvir Ahmad Khan, May 2010. The situation is similarly dismal at the SJA: see interview with Mr. Khalid Tipu Rana, July 2010. No printed information on the curricular and training modules used at the SJA was available. The only available printed information provided a very sketchy account of the courses offered. See Sindh High Courts Annual Reports 2002, 2003, 2004; and also "Outline for Crash Training Program of Additional District & Sessions Judges," Batch No. 50, June 28 to August 24, 2010 (SJA, 2010); "List of Short Training Programs by Sindh Judicial Academy," January 1, 2007 to August 23, 2010 (SJA, 2010); and "Judicial Training Curriculum" (SJA, 2006). The curricular documents for the BJA are also essentially inspired by the FJA counterparts, though with fewer details, and little evidence of any independent thinking or approach to curricular development. They also miss out on some of the more recently introduced areas/topics of study. See "Curriculum for Training of Civil Judges Cum Judicial Magistrates" (Baluchistan High Court, 2010). The KPJA, on the other hand, was still at a nascent stage at the time of writing, and it was, therefore, too early to predict its direction. However, unless it engages in a serious deliberative process, it can predictably end up being another clone of the FJA.

Effective training in the updated modules can conceivably have a direct positive impact on court efficiency and delay reduction. However, it would be overly optimistic to predict that this welcome improvement will necessarily translate into effective training, due to the several aforementioned constraints and institutional inadequacies. While the curricula were promising, none of the specific syllabi actually used for training at the academies or any stated mechanisms for syllabic and teaching evaluation and upgradation were available for review.[169] Mere curricular improvement could turn out, therefore, to be a non-starter.[170]

Finally, the judicial training academies consistently face acute funding shortages or irregular financing, which has a fairly adverse operational impact.[171] These funding constraints, the absence of operational autonomy, a general unavailability of good faculty as well as the lack of institutional commitment to pursue the same, and non-existent organizational capacity for curricular and pedagogic quality control and performance evaluation collectively reduce the possibilities for any meaningful institutional initiatives and reform in the foreseeable future. Meanwhile, by and large, the Pakistani judges remain inadequately trained and insufficiently motivated, increasingly frustrated and resentful, and consistently prone to making costly mistakes and contributing to miscarriages of justice.

[169] Ibid.

[170] Ibid. It must also be borne in mind that these positive initiatives point to the reform-mindedness of a dynamic senior judge. They may not be sustainable unless the FJA develops the autonomy, systems, and capacity to regularly consider, pursue, and implement improvement and reform.

[171] Interviews with Mr. Alam Zeb Khan and Mr. Muhammad Ashraf Chaudhry, July 10, 2010. As to the PJA, the main investment requirements pointed out by its administrators and staff were in the areas of operational expenses, a new PJA infrastructure (for which some land had been allotted by the provincial government: it emerged that the currently used newly built premises for the PJA were going to be taken up by the Lahore High Court for its own use), and budgetary support to boost the honoraria awarded to external resource persons, in order to attract more qualified people. See interviews with Justice (Retd.) Tanvir Ahmad Khan, May 2010; and Justice (Retd.) Khalil-ur-Rahman Khan, May 2010. The PJA external resource persons were paid a mere Rs. 3,000 ($35) or Rs. 5,000 ($58) per lecture – using the exchange rate at the time of writing – depending on their seniority and stature (ibid.). The interviews further revealed that there were no set criteria or mechanisms for attracting external resource persons. They were essentially chosen on the basis of personal contacts and recommendations from the Lahore High Court (ibid.).

Diagrammatic displacement: the lopsided landscape of justice sector reform

This section provides a diagrammatic evaluation of the analysis and critique of the governmental and donor-driven justice sector reforms in Pakistan over the past decade, as well as its current reform discourse and interventions. The idea is to provide a helpful visual contrast between where things currently stand and the various other levels to which they can potentially travel. Who the exact players involved in the reform discourse and process are (and who they are not) in turn determines the various potential disciplinary approaches to the reform process, the contrasting visions of reform, the disparate background assumptions, methodologies, and processes for developing reform prescriptions, and the precise direction and content of eventual reform prescriptions. Thus, there can be considerable variation in all of these variables, based on who actually controls and dominates the reform discourse and process.

The figures below attempt to capture these variations. The nature of the current discourse is contrasted with other possible levels of discourse – Levels 1, 2, and 3 respectively, in that order, denote increasingly wider and deeper discourses. As can be seen, there are several disconnects between the current reform discourse with the proposed levels with increasing width and depth. However, it is important to clarify that while the proposed levels indicate increasingly wider and richer reform engagements – due to the multiplicity and diversity of reform stakeholders that they attract and engage – the underlying purpose of this schema is to neither simply label them as more "democratic" or "populist," nor to convey a self-evident normative preference for them. Instead, the essential purpose of the diagrams is to capture the most significant and characteristic nuances of the current Pakistani reform discourse, and to determine what can possibly change when the membership of the "reform club" is opened up to additional and diverse players. In other words, the objective of this exercise is to deconstruct and demystify reform as it is currently visualized and undertaken, and to draw a distinction with the many overlooked or deliberately sidelined realms of other possibilities. Unless this is done, the question of normative preferences does not arise. The schema does, however, provide a helpful frame for determining such preferences. One states this, however, with the caveat that greater democratic and/or populist participation in a reform discourse does not directly or necessarily translate into more equitable, sustainable, and effective reform.

The players

Figure 6.1 below shows the possible players and participants in justice sector reform. I argue that the existing Pakistani reform discourse, as shown by the top most box, is dominated by multilateral and bilateral donors, international and local consultants (with essentially purely legal training and a technocratic outlook), and a coterie of appellate court judges. They drive the future direction of courtroom reforms and the current narrow agenda of the overall legal reforms in the country. The current discourse is clearly disassociated with wider, richer, and greater participatory levels of engagement, as shown by the boxes below. Moving

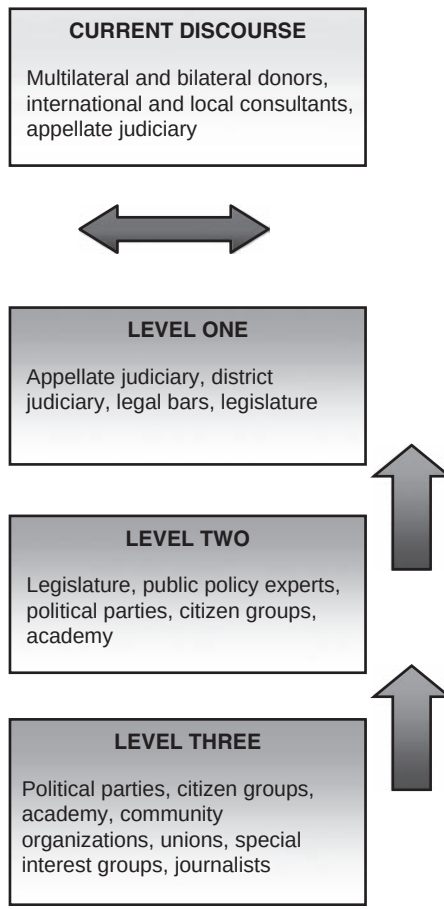

CURRENT DISCOURSE
Multilateral and bilateral donors, international and local consultants, appellate judiciary
LEVEL ONE
Appellate judiciary, district judiciary, legal bars, legislature
LEVEL TWO
Legislature, public policy experts, political parties, citizen groups, academy
LEVEL THREE
Political parties, citizen groups, academy, community organizations, unions, special interest groups, journalists

Figure 6.1 The players

upwards from the box showing Level 3 to the box showing Level 1, there are multiple important stakeholders in the justice sector that can feed into the eventual shape and nature of legal and judicial reform. However, they are largely absent from the current discourse. There are even no feedback loops flowing upwards from the district judiciary to the decision-makers, closest as it is to the end-users of the formal adjudicative system. The absence of the legislature from the current discourse is all the more glaring given that many of the problems confronting the Pakistani justice sector seem to stem from archaic laws and outdated regulatory regimes. Further, the current discourse has weak or non-existent linkages with the country's nascent academic discourse, as well as a more holistic, multi-disciplinary perspective coming from broader public policy debates that link legal policy with economic, social, and political policy. At the deepest and most participatory level, i.e. Level 3, demand, analysis, and ideas for reform would actually germinate from the country's political processes and debates, its diverse social discourses, and analyses stemming from the academy and intelligentsia, ideally informing lawmakers for giving appropriate legal shape to societal aspirations and consensus.

The disciplinary approaches

Who controls and dominates justice reform determines the choice of disciplinary approaches to the issues being discussed and analyzed. If we were to follow the schema in Figure 6.1, Figure 6.2 lays out the main disciplinary approaches of the players listed at the four different levels. Dominated as the current discourse is by donors and consultants, I argue that they invariably look upon the justice sector's problems as those of ineffective management and inadequate physical and human resources. Identifying the courts as the exclusive locus of all interaction between the citizens and the law, they perceive the delays and inefficiencies in the courts as the fundamental problems faced by the end-users of the justice system. Furthermore, their main counterpart in this engagement is the judicial leadership, which, I argue, is increasingly pursuing a policy of deliberative disengagement. The judicial leadership, in turn, is often temperamentally conservative vis-à-vis change and reform, as well as territorial in terms of relinquishing space to other stakeholders in order for them to question existing systems, processes, and approaches. The donors/consultants, on the other hand, I argue, often distance themselves from any deeper probing for fear of trespassing into the realm of the

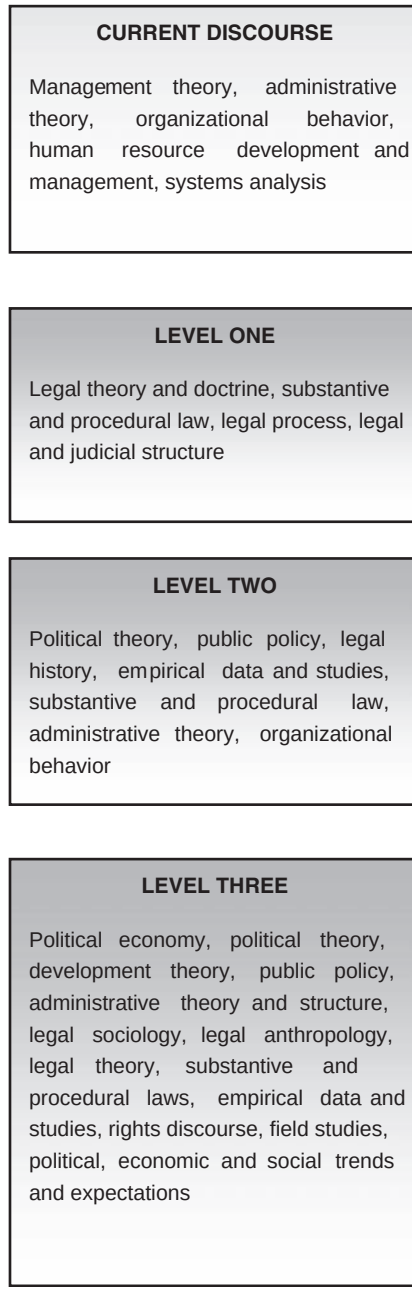

CURRENT DISCOURSE
Management theory, administrative theory, organizational behavior, human resource development and management, systems analysis
LEVEL ONE
Legal theory and doctrine, substantive and procedural law, legal process, legal and judicial structure
LEVEL TWO
Political theory, public policy, legal history, empirical data and studies, substantive and procedural law, administrative theory, organizational behavior
LEVEL THREE
Political economy, political theory, development theory, public policy, administrative theory and structure, legal sociology, legal anthropology, legal theory, substantive and procedural laws, empirical data and studies, rights discourse, field studies, political, economic and social trends and expectations

Figure 6.2 The disciplinary approaches

political and hence the controversial. As unelected technocrats who function under limited and time-bound contracts, and lack longer-term horizons, commitments, and public accountability, they have few or no meaningful ongoing links or engagement with elected political representatives and wider society, hence their reliance on the disciplinary approaches listed in the top box.

The boxes representing Levels 1, 2, and 3, on the other hand, show how the inclusion of additional important stakeholders in the justice sector may increasingly widen and deepen the level of engagement, broaden the disciplinary approaches, and open up the existing system to several different levels of analysis, critique, and modification. Rather than mere capacity enhancement and management reform, the agenda may widen to not just legal but indeed overall systemic reform. At Level 3, the limited paradigms of existing design and structure may no longer constrain and limit the reform discourse. Thus, a discussion of alternatives becomes possible. From Level 1 to Level 3 there is also a shift from comparatively technocratic engagement to economic, social, and political engagement. The primary focus shifts from the laws to society itself and thereby to the possible shape and structure of new desirable laws.

Background assumptions and vision of reform

The players dominating justice reform not only impact the choice of disciplinary approaches employed for analysis, but also the vision for reform and, very importantly, the background assumptions and imperatives influencing the nature and bent of the reform discourse. As the top most box in Figure 6.3 below shows, I argue that the existing donor, consultant, and judicial leadership-led reform discourse in Pakistan is overwhelmingly reliant on and shaped by the existing reform direction biases of donors and consultants, regurgitated templates, donor-lending imperatives, and the socially isolated thinking in the upper echelons of the judiciary. Multilateral donors in particular gauge their professional performance based on the successful extension of loan tranches upon adequate governmental compliance with dictated policy actions (at times, regardless of whether the compliance is merely a box-ticking exercise or the prescribed reform has had any real or sustainable impact). The Pakistani judicial leadership's views on judicial reform have been historically reliant on donor-driven, court-centric prescriptions pushed forward through incentive structures targeted at the judiciary. At present, there is somewhat of a reversal of roles in this relationship. I argue that

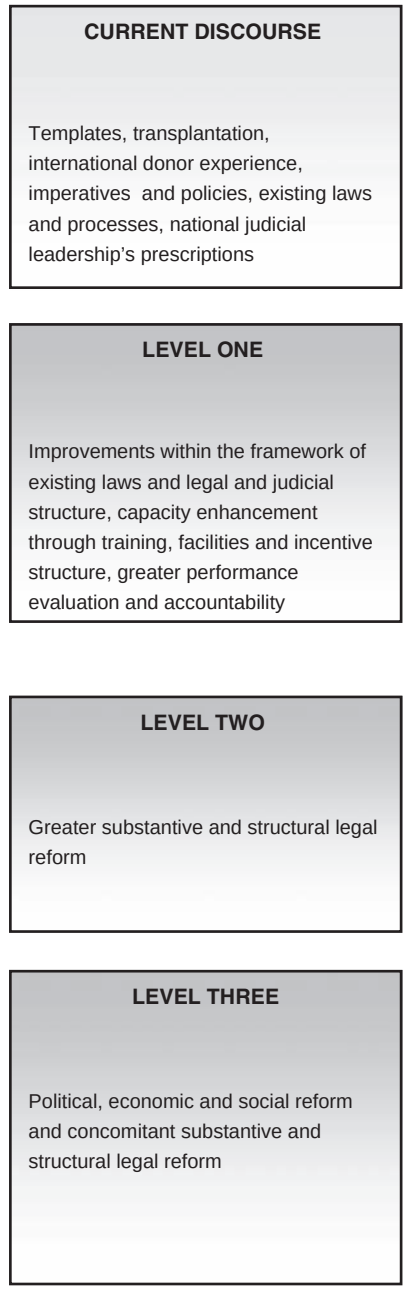

CURRENT DISCOURSE
Templates, transplantation, international donor experience, imperatives and policies, existing laws and processes, national judicial leadership's prescriptions
LEVEL ONE
Improvements within the framework of existing laws and legal and judicial structure, capacity enhancement through training, facilities and incentive structure, greater performance evaluation and accountability
LEVEL TWO
Greater substantive and structural legal reform
LEVEL THREE
Political, economic and social reform and concomitant substantive and structural legal reform

Figure 6.3 Background assumptions and vision of reform

the judiciary is moving even further away from the idea of any legal, structural, or process reforms and focusing more or less exclusively on physical and infrastructure capacity building, greater accountability of district judiciary by the appellate judiciary, operational, fiscal, and budgetary autonomy, and delay reduction. This in turn has further narrowed the ambit of donor-driven reform.

As can be seen at Levels 1, 2, and 3, with the inclusion of multiple additional and vital stakeholders in the justice sector, and, therefore, a diversity of perspectives, assumptions, and disciplinary approaches, the menu and vision of reform would likely become much more extensive. There can be seen a likely progressive shift from mechanical legal and judicial reforms to a deeper focus on distributive justice and equity, and the necessary enabling political, economic, and social reforms and regulations. If there are connections and linkages between the three levels, the ideas, imperatives, and directions for reform would travel upwards from Level 3 to Level 1. If, on the other hand, there is little or no engagement between these levels, the deliberations at Level 1, in particular, can face the problem of bounded rationality and a significant disconnect with society. This would acutely constrain the capacity to meaningfully inform and mold the nature and direction of legal reform. This can be seen from the variations in the scope and ambit of the reform agenda at each level.

The process of reform

The process of reform is an inevitable outcome of the nature and mix of the dominant players, their disciplinary approaches, and their background assumptions/visions of reform. Following the schema used in previous figures, Figure 6.4 demonstrates how process variations exist at different possible levels of engagement and participation of the justice sector reform discourse. I argue that the current reform discourse in Pakistan is driven and dominated by reform programs and projects introduced by international multilateral and bilateral donors. Their design involves limited engagement with/learning from the actual stakeholders of reform and hence lacks contextual rigor and, often, local relevance. They are largely based on existing templates, donor policy imperatives, and what is quickly negotiable with the incumbent government and judicial leadership in short and high-pressure implementation time frames. Increasingly, a key player at this level, i.e. the national judicial leadership, essentially holds its own counsel and operates through exclusive policy-making bodies and closed-door engagements

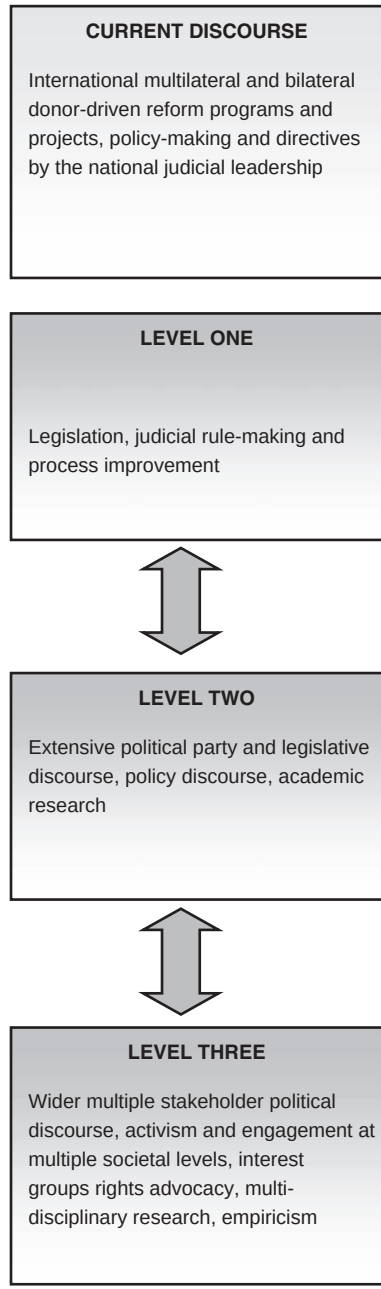

CURRENT DISCOURSE
International multilateral and bilateral donor-driven reform programs and projects, policy-making and directives by the national judicial leadership
LEVEL ONE
Legislation, judicial rule-making and process improvement
LEVEL TWO
Extensive political party and legislative discourse, policy discourse, academic research
LEVEL THREE
Wider multiple stakeholder political discourse, activism and engagement at multiple societal levels, interest groups rights advocacy, multi-disciplinary research, empiricism

Figure 6.4 The process of reform

that seldom have any discussants other than senior serving appellate court judges, who are also the administrative heads of the various appellate courts.

In contrast to this, the boxes representing Levels 1, 2, and 3 show the wider and more participatory deliberative processes that can feed and derive ideas, imperatives, and directions from each other, as shown by the arrows. While Level 1 denotes legislative and judicial deliberations and law-/rule-making, Levels 2 and 3 represent even deeper, wider, and more fundamental discussion and deliberation processes in society. They also highlight the multiple sources of ideas and possibilities coming from the academy, the policy think tanks, research centers, advocacy groups, investigative media, and official and unofficial data collection, etc. that can potentially inform public debate and deliberations. These in turn can inform and influence legislative and judicial law-/rule-making at Level 1. At the same time, if there are porous boundaries between the levels, what is happening at Level 1 ought to stir, inform, and structure the discourses at Levels 2 and 3. Hence, there can be important feedback loops flowing between these levels.

As can be seen, at present these multiple processes/layers of thinking about the justice sector are essentially severed from the existing justice sector discourse in the country, as depicted in the top most box. This box stands in isolation and is characterized by a non-participatory reform process, dominated and dictated by the perspectives and imperatives of a very small and exclusive coterie of judges, and those employed by the international and local justice sector reform industry.

The prescriptions

In the end, the eventual reform prescriptions that emerge from any given justice sector reform discourse are a function of who dominates it and which analytical methodologies, assumptions, visions, and deliberative processes are given primacy over other possible alternatives. As can be seen from Figure 6.5, the reform prescriptions emerging from the existing reform discourse in the country are essentially of a managerial and administrative nature, supplemented by brick and mortar reforms and, at times, some focus on the training of judicial and court staff. Actual legal reform, as I demonstrate below, is now very much on the backburner, for the aforementioned reasons as well as the non-involvement of the legislature and political parties in the reform discourse. Any legal amendments or rule-making is more or less exclusively

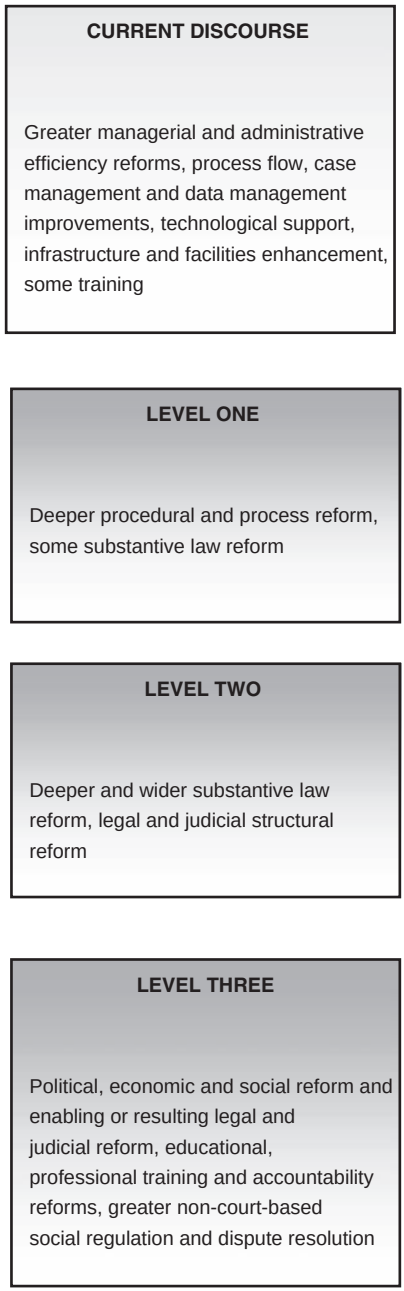

CURRENT DISCOURSE
Greater managerial and administrative efficiency reforms, process flow, case management and data management improvements, technological support, infrastructure and facilities enhancement, some training
LEVEL ONE
Deeper procedural and process reform, some substantive law reform
LEVEL TWO
Deeper and wider substantive law reform, legal and judicial structural reform
LEVEL THREE
Political, economic and social reform and enabling or resulting legal and judicial reform, educational, professional training and accountability reforms, greater non-court-based social regulation and dispute resolution

Figure 6.5 The prescriptions

directed toward enhancing the operational efficiency of the court system. In contrast to this, active engagement at Level 1 is likely to generate deeper reforms – at the procedural, process, and substantive levels – although their focus could as likely be on narrower issues of delay reduction and pendency, rather than on the wider and more complex issues of disempowerment, inequity, and exploitation. If, however, the Level 1 processes of reform deliberation work in conjunction and in consonance with the wider and deeper deliberations at Levels 2 and 3, there is likely to be much greater focus (depending on how wide and accessible these engagements are) on substantive law reform with certain political and public policy goals. There can then be the likelihood that these goals may focus on meaningfully addressing legal disempowerment, the exploitation of weak and vulnerable societal groups, and the actual structural, cultural, and sociological reasons for rights violations and remedial inefficacy.

This of course is subject to the ideals, ethos, strength, maturity, and regularity of the deliberative processes at Levels 2 and 3. However, by their very nature and the diversity of their participants, they necessarily visualize a richer menu of reform discussions and resulting prescriptions than the one on display in the top most box. Furthermore, their ambit of reform will likely not be restricted to courtrooms and the formal legal system. Instead, they may encompass several other societal institutions and mechanisms that interplay with a wide array of disputes in society, weak or non-existent rights, areas of non-existent regulation and legislation, and multifarious possibilities for the resolution of these problems. Finally, deliberations at these levels contain the possibility of large-scale structural change in how society is governed and regulated, rather than the narrow and perfunctory tinkering with existing laws that characterizes the current reform discourse.

The pyramid of reform process

If a robust and wide-ranging justice sector reform discourse were to take place, as visualized at the proposed Level 3, the resulting picture would approximate what is shown in Figure 6.6. The flow of ideas, imperatives, and designs for law reform are directed upwards from a larger societal base through various social, political, and legal processes, eventually informing the political, policy, and academic discourse at the next level. This in turn would inform the legislative and judicial discourse, so that both through legislative enactments and judicial interpretation of laws

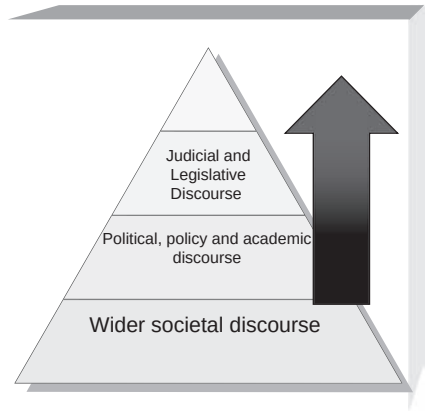


Figure 6.6 The pyramid of reform process

and new rule-making, the legal and judicial system is brought in greater alignment with societal needs, aspirations, and expectations. This then would be the agenda setter and the path to eventual reform enactments.

The inverse pyramid

In contrast to the above, I have endeavored to demonstrate in Figure 6.7 that the current reform discourse and process in Pakistan are actually quite the reverse. Reform prescriptions from the "legal community" flow (or are imposed) from top to bottom. There is an overwhelming domination of the process by the "legal community" (as shown by the wide base of the inverse pyramid) as compared to other stakeholders. There is also a fundamental disconnect between the "legal community" and the various other important stakeholders in the processes of democratic and justice sector reform, as well as the end-users of the justice system (as shown by some of the prominent societal groups and stakeholders in the justice sector as separate and distinct boxes).

As a result of the nature and characteristics of the players which dominate the existing justice sector reform discourse in Pakistan, their background assumptions, disciplinary biases, and methodology/process of reforms, the eventual menu for reform is quite limited. Especially over the past decade-and-a-half, the predominant focus of reform is in areas such as those listed in Figure 6.8, which denotes the current discourse. As can be seen, the inverse pyramid of reform puts forth a very court-centric approach to reform. It emphasizes: infrastructure enhancement

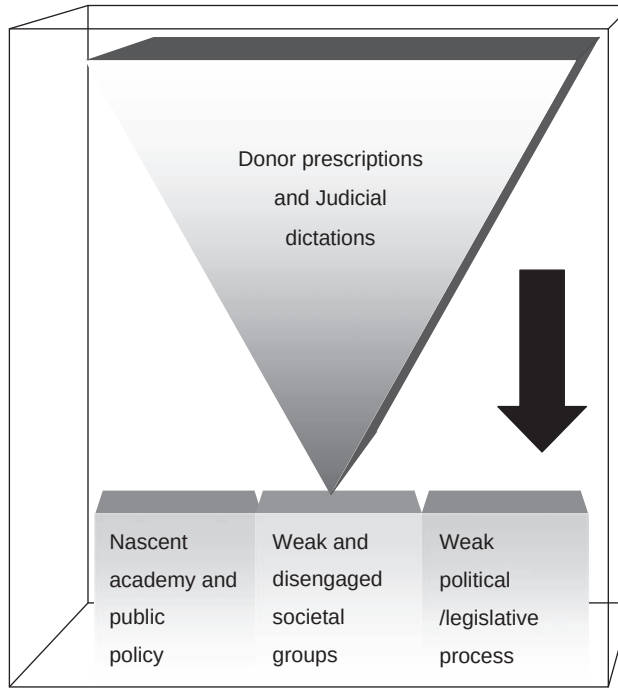


Figure 6.7 The inverse pyramid

and a growth in the size and ambit of the formal court system; better court, case docket, and process flow management; and, to a lesser extent, better training of judicial officers and court staff (but with a primary focus on managerial and administrative training). Furthermore, all of these reforms are historically driven and continue to be motivated by the end goal of addressing delays in litigation and high case pendency. As is evident, this is a very narrow and technocratic view of reform and even if successful, it can at best make some court process improvements and reduce the time taken to adjudicate legal cases in courts. However, even that is highly unlikely, as delay and case pendency are a function of several factors extraneous to court processes (as discussed in Chapter 5).

What are evidently missing from this menu are the more essential issues that, I argue, are highly germane to meaningful reform. This is primarily for the reason that any debate over such issues would amount to asking some fundamental critical questions about the existing laws and

Brick and mortar reforms
Case docket management systems
Introduction of professional administration in courts
Use of technology
Salary enhancements
Judicial and court staff training programs
Capacity building of judicial training institutions

Figure 6.8 Current discourse

the legal/judicial system – which the donors, consultants, and judicial leadership are neither keen nor empowered to ask, as they fall within the ambit of political discourse, constitutional amendment, and ordinary legislation. There is a greater likelihood that these more fundamental issues would be taken up for debate if a robust Level 1 discourse exists. They are listed in Figure 6.9, and include, inter alia: the adequacy of the existing court structure and its ambit; a review of the processes through which judges are appointed, evaluated, and held accountable for their performance; a qualitative review of the judicial function and output; a more drastic review of procedural law and legal processes; and, finally, more meaningful and deeper legislation directed at substantive law reform, in order to address legal persecution and misuse of legal remedies.

Moving on to Figure 6.10, one can see what else is largely missing from the current Pakistani justice sector reform discourse by looking at the kind of analyses and questions that would likely occur if a vibrant Level 2 discourse existed in the country. In the absence of a robust, ongoing, and multidisciplinary historical and contemporary analysis of

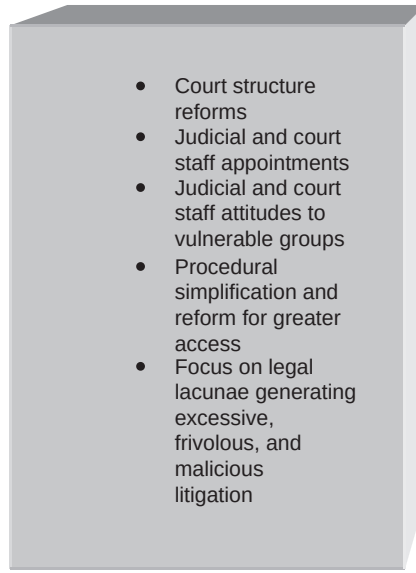

Court structure reforms
Judicial and court staff appointments
Judicial and court staff attitudes to vulnerable groups
Procedural simplification and reform for greater access
Focus on legal lacunae generating excessive, frivolous, and malicious litigation

Figure 6.9 Level one discourse

Historical and policy analysis to gauge differential impact of substantive laws
Focus on equity and distributive outcomes of substantive laws

Figure 6.10 Level two discourse

the possible differential impact of the law and the formal legal system on differently situated sections of society, there is likely to be very little that may flow upwards to inform the political, constitutional, and legislative discourse at Level 1.

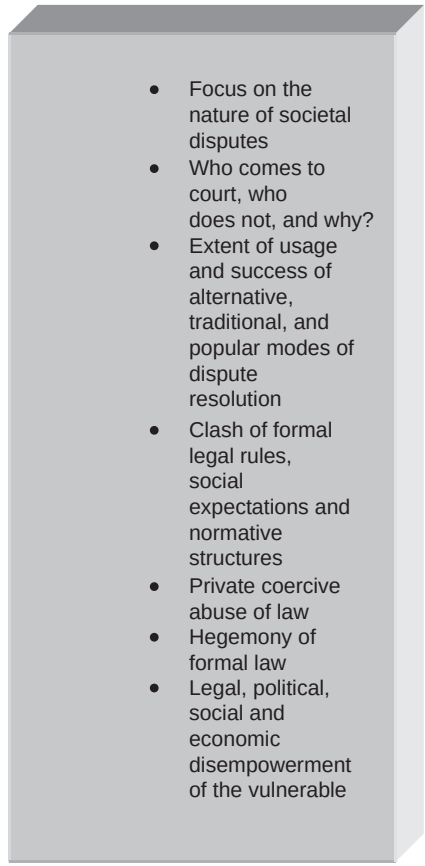

Focus on the nature of societal disputes
Who comes to court, who does not, and why?
Extent of usage and success of alternative, traditional, and popular modes of dispute resolution
Clash of formal legal rules, social expectations and normative structures
Private coercive abuse of law
Hegemony of formal law
Legal, political, social and economic disempowerment of the vulnerable

Figure 6.11 Level three discourse

The quality, depth, and sustainability of a Level 2 discourse depends in turn on the kinds of questions that are being actively debated in the larger societal discourse among multiple and diverse stakeholders, interest groups, and societal groups, as shown in Figure 6.11, which depicts Level 3. The focus here ought logically not to be on the technical intricacies of the legal and judicial system, but instead on the underlying factors, tensions, and contestations in society that give rise to disputes, conflicts, disempowerment, and exploitation. It is these very factors, tensions, and contestations that eventually give rise to court battles. Furthermore, the extent to which the academy, the policy research groups, and other relevant players at this level are highlighting

and researching the kind of questions listed in Figure 6.11 will ultimately determine the rigor, quality, and direction of the debates and problem-solving at the upper levels through various feedback loops. I argue that currently there are acute weaknesses, capacity constraints, and major gaps in the overall Pakistani justice sector reform discourse due to the nascent or very weak state of its Levels 1, 2, and 3 discourses. This state of affairs, I propose, has majorly contributed toward the usurpation of space for dialogue and an eventual domination of the reform agenda by the small coterie of reform players. At the same time, the dominant and domineering small coterie of reform players has further crowded out the possibilities of Levels 1, 2, and 3 discourses. Their domination acts as a continuing obstacle to the flourishing of these deeper levels of discourse. Simultaneously, they misleadingly put forth and impose their own ideologies and perspectives as the only desirable and all-encompassing sum-total of legal and judicial reform that Pakistan actually needs.

Conclusions

The evaluations and analyses conducted in this and the previous chapters put forth extensive evidence to support the accuracy of the diagrammatic schema proposed in the preceding section for visualizing the current Pakistani justice sector reform discourse, as well as the various other possible but neglected levels of discourse. The case studies of two recent and major donor-driven reform projects – the USAID Assessment and the ADB PCNA – clearly demonstrate that justice sector reform in Pakistan continues to be an exclusionary, narrowly technocratic, and ultimately decontextualized exercise. As Figure 6.1 proposes, the dominant players in this reform discourse and process have been and continue to be the multilateral and bilateral donors, international and local consultants, and judicial leadership. The reform discourse is becoming further truncated and thereby facing a rapid erosion of any internal cohesion due to the growing discordance and the fractured relationships between the increasingly insular judicial leadership and the donors, as well as the disparate and unfocused perspectives of the latter. Furthermore, these case studies and the recently stated reform agendas by the major donors and judicial leadership demonstrate that the general reform obsession has moved from the already narrow "efficiency" paradigm – which

characterized the previous decade-and-a-half of reform in Pakistan – to an even narrower "micro-efficiency" paradigm.

The crimes of omission are all the more drastic considering that the aforementioned reform projects undertook to engage with areas of tremendous complexity, i.e. the multi-tiered, empirically ignored, and largely under-studied complexity of the phenomenon of escalating litigation and case delays in Pakistani courts, and the envisioning of, inter alia, future "governance" and "ROL" reforms in the vast, diverse, politically unstable, and historically "specially" governed areas in Pakistan's north west. Careful cognizance of and appreciation for history and context, highly relevant anywhere, were of a fundamental importance for any meaningful comprehension of these areas, let alone for visualizing actual reform. However, as the case studies document, the two projects were severely debilitated by their non-participatory reform processes and their consequently narrow, technocratic, and ultimately self-defeating disciplinary approaches, visions, background assumptions, and reform prescriptions. The actual choices made under all these evaluative categories are reflected in the 'Current Discourse' boxes in Figures 6.2, 6.3, 6.4, and 6.5. The two case studies also divulge an institutionally entrenched disinterest, as well as inability, on part of the current reform players to consider engagement at the possible Levels 1, 2, and 3 described above, even though the subject matter of reform in these projects could not conceivably be addressed without such engagement.

Ultimately, the two case studies exhibit the stark and jarring disconnect illustrated in the diagrammatic representation in the above section. It is the disconnect on the one hand, between the arduousness of the reform terrain that the extant Pakistani justice sector reform process and players endeavor to traverse, and the unimaginative, non-participatory, and often parochial nature of the reform discourse and its resulting prescriptions on the other hand. This disconnect is further magnified in the field studies conducted at the Multan and Swat district courts described and discussed in this chapter. Grassroots feedback from the district courts in places as diverse as Multan and Swat furnish further support for the absence of any feedback loops between the district judiciary and the judicial leadership. It reports the breakdown of the vital communication lines that ought to convey valuable information and proposals from those in the trenches who are facing multiple issues and challenges on a daily basis – quite violently so in the highly embroiled contexts like Swat – and the distant and aloof high-level

reform deliberations. As a result, the reform prescriptions emanating from Islamabad, Lahore, Karachi, Peshawar, and Quetta seem to obstinately bypass the compelling lessons from history as well as context. Meanwhile, far from these lofty pedestals that are used for equally lofty utterances, the ordinary citizens are bone weary of the trench warfare of lower court litigation and its several negative externalities. The evidence from the district courts indicates negligible positive impact of the decade-and-a-half of a highly expensive fascination with brick and mortar, court and case management, and other efficiency-related reforms. In spite of all this, the dated and ineffectual reform manuscript continues to be internally unquestioned and *de rigueur*, even in the face of growing public dissatisfaction with the extant legal and court regimes.

Finally, the evaluation of the various Pakistani judicial training academies divulges the disturbing themes of "control" and "neglect." While the judicial leadership continues to exercise a strangulating control over all aspects of judicial training and upgradation, there is not much to report by way of progress or improvement. This evinces an additional negative cultural manifestation of the narrow ambit of the reform discourse and the exclusivity of the "reform club" – which seems to frequently encourage turf management and vested institutional interests at the cost of a wider and deeper reform dialogue, activity, and impact. So while it is evident from the institutional structure and the overarching culture of the judicial training academies that only judges are allowed to train judges and run such academies, it is also fairly apparent that they are not even managing to make a half decent job of it. This state of affairs once again exposes the low or non-existent impact of the previous decade-and-a-half of "efficiency"-focused reform efforts, which included judicial training in its list of reforms. It also questions the wisdom of entrusting those who were identified as the objects of reform with the more or less exclusive responsibility of bringing about such reform. Despite all the rhetoric about gearing up to reform the justice sector in particular and the country in general, the Pakistani judicial leadership has largely failed in even putting its own house in order.

7

Toward a new approach

Learning from history

The prevalent Pakistani legal and judicial reforms discourse is reminiscent of what Upendra Baxi describes as "juristic *dependencia*," i.e. a legal culture where legislative draftsmanship and judicial interpretation overtly rely on foreign models and remain conditioned by the development of these models. Such a culture has reduced the contemporary Indian legal and judicial system to "a subordinate, almost *vassal* legal system, thereby only *occasionally* serving the needs of Indian society."[1] What Baxi describes has much resonance for Pakistan. Having said that, Chapter 1 did not set out to establish that there is no element of credibility to the "inevitable modernization argument," or even to the "desirable modernization argument." The ideas and ideals of, inter alia: the uniformity, certainty, and consistency of laws; equal treatment under the law, regardless of "status"; the safeguards of "due process" and "natural justice"; abstract rules of universal application rather than special categories of dispensation for different groups and the rampant use of discretion; and embedded constitutional rights for citizens surely denote strides in the right direction. Modern constitutional republics like Pakistan are committed to these ideals.

However, I have further argued that if the diverse "narratives of colonial displacement" – which put forward the "radical displacement argument" – are closely examined, it transpires that while the colonial legal project took steps toward the establishment of such ideals, it was also all too frequently characterized and influenced by very divergent goals and outcomes. These were the imperatives of: pure domination and subjugation; the exigencies of frequently shifting and contradictory policies; internal ideological and intellectual paradoxes; political expedience

[1] See U. Baxi, *The Crisis of the Indian Legal System* (New Delhi: Vikas Publishing House, 1982).

and real politic; extractive aspirations and appetites; regional variations and local imperatives; and differential as well as, at times, an inhumane treatment of colonial subjects. While it would be delusional to utterly ignore the colonial legal project's contribution toward bringing about a certain level of desirable structure, consistency, uniformity, and predictability to the Indian legal system, it would also be equally deceptive to ignore those instances where it clearly deviated from or undermined these very principles. To that extent, it was as "despotic" as the ostensible "despotism" it proclaimed to be replacing. This makes it necessary to gauge the contemporary relevance and impact of several colonial laws and the various elements of the colonial legal system that survive unchallenged in the post-colonial milieu.

While exploring the "narratives of colonial displacement," I have also discussed how the pre-colonial indigenous legal cultures and methods underwent various kinds of alterations, even transformations, during the colonial era. While the pre-colonial system of Islamic law, for instance, was made to go through several radical modifications under colonialism, it becomes apparent that various strains of indigenous dispute resolution mechanisms did survive the colonial period – co-opted, used, and amended as they were in various complex ways under colonialism. Post-independence, there has been little official patience in Pakistan for these remnants of the past, but that does not preclude the fact that they survive – if not flourish – whether autonomously, in opposition to, or in multifaceted hybrids with the formal legal system. The Pakistani reform discourse, however, seems to be oblivious to the arena of struggle that displays tensions and contestations between the formal legal system and the public; as well as the tensions and contestations between state-run dispute resolution mechanisms and traditional and newly emergent notions of popular justice. Indeed, one can gauge the health and outreach of the formal legal system by gauging the same of traditional and newly emergent dispute resolution systems – for there exists an inverse relationship between the two. This is not to extend any value judgment on either of the two. It is basically to suggest that where the formal and the informal are completely delinked, as in Pakistan, the fact that the informal may be gaining ground could well be an indication of the lack of public faith in and its accessibility of the formal. Laws are not just the mode of dispute resolution, but also a significant terrain for nation making, community building, development through distribution, and all manners of contestations for equity and rights protections. It is imperative to see if these tasks, and the expectations attached to them,

are shifting from the formal to the informal sphere. This is quite likely where the laws have not evolved with society, and where the access to justice through the formal legal system is increasingly differential and discriminatory.

When one speaks of pre-colonial indigenous legal cultures and methods, more precise descriptions are very difficult to provide due to the paucity of reliable historical evidence that has survived the vagaries of time. Therefore, one risks creating a sense of romanticism and nostalgia around seemingly vague ideas. In many ways, it is also arduous to discern the truly indigenous from what is not; what we have, therefore, is a contest of interpretations. However, as many scholars demonstrate, although the substantive details of these diverse legal cultures and methods may have been lost over time, what are still decipherable are the several underlying facets of a common ethos and process employed for dispute resolution, and also how it promoted the virtues of intelligibility, access, and reconciliation. These virtues were and remain important societal goals – they were displaced once all disputes in society became potential legal cases under an elaborate legal and judicial system, with ultimate winners and losers.

Therefore, the idea is not to attempt to revive or recreate the past – an impossible task given that society itself has evolved in many ways – but to capture what used to work for many, and may still work for them now, since it resonated and continues to deeply resonate within the warp and woof of society. The idea is also to appreciate the complexity and dynamism of culture and society and their resilience to what is artificially imposed on them, and hence the resulting terrain of struggle. Finally, the idea is to acknowledge and meaningfully engage with the unfinished business of the colonial/post-colonial transitions. A logical follow-up question would be how should we interpret the post-colonial situation and the relevance, role, and impact of its laws and legal system, given their historical context? An enormous literature has proliferated on these themes, debated some issues, and missed out on others. However, the Pakistani reform discourse has skirted around the essential insights that emerge from the vast taxonomy of arguments from this literature of colonial displacement. Consequently, the structure, form, content, and process of law in Pakistan have not really undergone that much change since the formal demise of colonialism. Meanwhile, while diagnosing the ills and ailments of the Pakistani laws and its legal system, its reform discourse simply overlooks the obvious links between current laws and their historical ethos and underlying policy. It also pays no heed to the

narratives explaining the controversial and problematic impact of this ethos and these policies under colonialism. It is a textbook case of a discourse that is intent upon selective amnesia.

It may be considered rather trite to suggest that, in the post-colonial context, a renewed scrutiny of the historical context, intent, and outcomes of the colonial legal project is essential. It may be deemed unnecessarily didactic to stress that the "narratives of colonial displacement," especially those making "the radical displacement argument," ought to necessarily inform the contemporary reform discourse. However, perhaps this may not be the case considering how intellectually isolated, narrowly compartmentalized, and sociologically aloof Pakistan's legal debates actually are. Ultimately, if there is any credibility to the argument about the major displacements of pre-colonial indigenous legal cultures and methods, and the consequent phenomenon of acute public alienation, the mere physical departure of the British from India has not simply made this a matter of purely historical interest. Quite apart from the several arguments made in these narratives, there is considerable contemporary evidence that indicates that the unintelligibility of the laws, lack of access, wide-scale legal disempowerment, differential treatment under the law, abuse of law, coercion through law, as well as coercion of the law itself are widely prevalent in Pakistan. The citizen feedback discussed in Chapters 2 and 3 provides strong affirmation of this. In the same context, the phenomenon of "popular justice" and the extant non-court dispute resolution mechanisms, also discussed in detail in Chapters 2 and 3, emerge as significant areas of necessary attention. They are likely to provide important insights into the extent of the popularity of such mechanisms in society, and also into whether they work and why they work for those who opt for them. Equally importantly, such scrutiny may help identify the deeper problems with the formal legal/court system, and its multiple levels of incongruity with societal norms and aspirations.

Overall conclusions: from the court and the case to the dispute and the disputants

In view of the diverse multi-disciplinary literature in the areas of law and development, Indian legal history, public policy, legal anthropology, legal theory, and sociology of law, discussed at length in Chapter 1; the detailed analysis of empirical feedback from the end-users of the legal and justice system in Chapters 2 and 3; and the close evaluation of the

various government and donor-led justice sector reforms throughout Pakistan's history, the several local and international reports and studies on rule of law reform, multiple interviews, and the case studies of representative recent reform projects as well as the operation of the district judiciary in diverse areas of Pakistan, as also the judicial training academies operating in the country, examined in Chapters 4, 5, and 6, I essentially make two broad contentions.

My first contention is that the narrow perspectives and agendas of what I call the "legal community" monopolize the justice sector reform discourse and process in Pakistan. As a result, they are socially de-contextualized. This "legal community" includes judges, lawyers, top government policy-makers and law officials, and local and international consultants who are employed in justice sector reform policy-making and advisory work in Pakistan. In many instances, the members of this community are the very consultants and advisors who design, formulate, influence, and implement the reform interventions, while simultaneously being the object/target of these reforms. Due to their particular ethos, perspective, and training – which are also often self-servingly insular – the reform prescriptions from the "legal community" adopt a thematically myopic and methodologically narrow and largely legalistic/technocratic perspective to law reform. Their reform agenda concentrates overwhelmingly on reforming the judiciary and the court system – and, there too, the scope is limited and superficial – it essentially focuses on the "speed" and "delivery capacity" of the extant legal and judicial system.

Furthermore, the aforementioned reform agenda pursues these goals through a strident advocacy for the insipid and ubiquitous menu of a greater number of judges, better infrastructure and technical facilities, higher remuneration, and greater staff support for the judiciary. Little or no attention is paid to the legal system's actual complex and multifarious interplay with and impact on the multiple and diverse sections of society. The reform agenda largely ignores the various social, economic, cultural, and political constraints – both within and without the courtrooms – that may inhibit access to legal remedies on the part of different sections of the contemporary Pakistani society. In any event, the extant reform process and the resulting reform prescriptions are highly exclusionary of vital stakeholders who are not the members of this "legal community." Finally, this reform agenda creates, promotes, and sustains an artificial divide between the legal system and society – thus reform is visualized in a self-created vacuum.

An additional problem that I discuss in this context is the growing popularity of legal rhetoric in the international law and development discourse. This has brought about a new reductionism to the international discourse, and consequently the municipal justice sector reform debates in developing countries. As a result, complex development issues are increasingly formulated, evaluated, and debated through the framework of legal concepts and remedies. This contributes to an increasing obliviousness to a meaningful appreciation of the risk of reducing to mere legalese what is a much more complex discourse. Consequently, this can distract attention from the need for a deeper and more participatory political and economic engagement with the underlying issues debilitating the justice sector. Ultimately, law reform and the related policy-making largely takes place without sufficient cognizance of social realities, diversity, and disparity – this is reform without any sense of context.

My second contention is that the reform discourse in Pakistan is further flawed because it is ahistorical in its analysis of the justice sector's various embedded problems. In other words, it does not engage with the reality of the continuing imprint of colonial law/policy-making on the current Pakistani laws and legal system. This is despite the fact that a rich array of scholarly literature on the colonial rule in India reveals that colonial law-making/legal system very likely caused wide-scale social, political, and cultural displacements. Motivated by a set of policy priorities formulated by the particular exigencies and imperatives of colonial rule (which also varied in different parts of colonial India and during different periods of colonial governance), this is hardly surprising. Many colonial legal codes, court procedures, and administrative governance frameworks are still largely intact and operational in Pakistan. There is an acute need to revisit their design and content in light of contemporary political, social, and economic realities, institutional challenges, and popular aspirations.

In view of the above, a better contextualized, historically insightful, socially cognizant, and institutionally participatory as well as operationally transparent approach to legal reform is a vital prerequisite for any greater positive impact on and a more effective consolidation of the constitutional rights and legal protections of the disadvantaged groups in Pakistani society. It is, therefore, important to shift the focus of justice sector reform from a purely technocratic/legalistic perspective to a legal-sociological viewpoint. In other words, it is vital to transfer the gaze from the courtrooms and cases to the disputants and disputes. This is essential

in order to clearly assess the real nature and underlying causes of disputes in Pakistan, particularly in rural Pakistan where the bulk of its population lives. Rural Pakistanis, and indeed even most urban Pakistanis, have far less contact with the appellate judiciary (the focal point of attention for the bulk of the justice sector reform discourse and its proposed interventions) than with the lower rungs of the state – the tehsil and district courts of first instance and appeal, the tehsil and district administration, and the local police stations.

It is also indispensible to determine how exactly these disputes emerge in society, get resolved, or, alternatively, are perpetuated. Whether and how some of these disputes become legal contestations are only second-order questions. Only after a better appreciation of the socio-politico-economic background and imperatives for potential legal contestations can these second-order questions be meaningfully examined. It is therefore crucial, for instance, to determine whether in typical and widely prevalent societal and community disputes there are regular winners and losers. It is equally critical to probe whether consistently ending up on the losing side is a function of certain existing disempowerments and socio-economic conditions. It is also essential to establish whether the formal legal system's cultural hegemony, cost, delay, and continuing incomprehensibility and/or lack of social fit persuades or forces many Pakistani disputants to resort to a wide array of attractive, as well as not so desirable, informal dispute resolution mechanisms and modes of popular justice.

The above lines of inquiry and foci of attention further necessitate a deeper exploration of whether the history, structure, sociology, ideology, and capacity of the existing legal system and its operators inhibits and constrains the latter in addressing social, political, and economic disempowerment and resulting injustice. At the same time, it is logical to ask whether these phenomena actually cause and/or assist the existing legal system and its operators to actually cement and perpetuate such disempowerment and injustice. This then raises the related question of whether it is the decontextualized nature and ahistoricity of the justice sector discourse that perpetuates this institutional inability, and even complicity. The upshot of all this is that a myopic focus on the legal system in isolation of its context, and the constant analytical formulation of disputes in society as essentially legal contestations, has a huge cost. The cost of this myopia is the exclusion of more meaningful, deeper, multi-lens evaluations of the socio-politico-economic dimensions of the justice sector which can substantially refine and augment our

understanding of the real reasons for an increasingly divided and contentious Pakistani society. The myopia is not even obfuscating our comprehension of the narrower question of why the formal justice/court system is, on the one hand, increasingly burdened with new legal cases and thus sluggish in its output, and, on the other hand, losing the trust and confidence of the people due to its inefficiency.

All of this should hopefully clarify that my critique of the Pakistani justice sector reform discourse does not simply provide the basis and lead up to an argument for merely adding greater analytical rigor and contextual awareness to the deliberations of the current discourse. The problem is much deeper than this. While pointing out the decontextualized and ahistorical nature of this discourse, I am actually further arguing that this discourse is too hegemonic, exclusionary, and in certain cases even self-serving and self-perpetuating. There is, thus, a fundamental problem with the current membership of the "reform club." Meaningful engagement with the fundamental underlying social, political, and economic factors that perpetuate discord in society are simply beyond the analytical reach, institutional agendas, and political leverage of the discussants in the current discourse. The mode and terrain for reform for these players, by both choice and necessity, are the courts, whereas many of the underlying causes for the problems faced by the actual disputants and eventual litigants in society lie far beyond the adjudicative and corrective capacity of the courts.

There is no gainsaying that even meeting the narrowly framed "efficiency"-focused reform goals of reducing case backlogs and expediting case disposals – the choice areas for reform over the past decade-and-a-half – necessitate a deeper understanding of what causes societal dispute and resulting litigation. They too require a better appreciation of whether archaic laws, outdated procedures, increasing claims on shrinking resources, greater exploitation on the basis of political/economic power, or any of the several other relevant demographic, sociological, cultural, political, and economic variables contribute to excessive litigation. They also mandate a consideration of whether the solution lies in controlling and/or rationalizing any of these contributory variables, or in exploring alternative modes/processes for dispute resolution for certain kinds of disputes. In any event, the predominant past and current reform focus on tweaking certain supply-side variables – higher number of judges, better courts, enhanced salaries, more computers and fax machines, etc. – has been a resounding failure in delivering positive results, even in terms of the narrow and modest targets set to be met.

It is high time that the much neglected demand variables received some urgent attention. At the same time, the consistently overlooked underlying, complex, and diverse societal disputes and contestations – which are erroneously perceived solely as an earlier amorphous phase of eventual legal cases – may point to much larger concerns of a crumbling Pakistani social contract and an eroding state apparatus. The pertinent national questions of first-order priority are thus much bigger and more complicated than the determination of why the courts do not process legal cases more quickly and how exactly can they be coaxed to show greater alacrity – and they can only be meaningfully addressed through robust political and economic debate and reform. That in turn ought really to determine the shape and priorities of the Pakistani legal and court system.

In the United States, routinely scorned advertisements ascribed to the ambulance-chaser variety of law firms often entice potential clients with the promise: "Get the law on your side." Even such uncertain promises are rarely available to those who live in Pakistan. For many people and groups in post-colonial societies who have historically never "gotten the law on their side," this is a deeply devastating phenomenon at several levels. Their historical and ongoing "displacement" will remain unrecognized and unaddressed unless the deeper underlying reasons for the same are broached. For this to happen, the "cultural hegemony of law" will have to give way to a larger, more democratic, and richer consultation – even if it requires a certain degree of counter-hegemony to bring it to fruition.

Appendix 1

The Lahore District Courts Survey: background and methodology

Research study development and consultative process

Although the actual questionnaire and methodology for the Lahore Survey was finalized during November 2010, it is based on extensive literature and documentary review, deliberations, discussions, and engagements conducted in both 2009 and 2010 – with lawyers, public policy practitioners, public policy academics, historians, legal academics, legal anthropologists, legal sociologists, political-economists, government officials, and judges, generally from all over Pakistan and specifically at Harvard University, Tufts University, New York University, and the University of Wisconsin at Madison. Furthermore, the eventual questionnaire and methodology benefited from conference attendance, paper presentations, and resulting discussions in 2009 and 2010 at Harvard Law School, Boston College School of Law, Tufts University, the UN Development Program (UNDP) – Asia Pacific Regional Centre, Thailand, the International Labor Organization (ILO) – Geneva, Switzerland, The Asia Foundation, Islamabad, The Foundation Open Society Institute (FOSI), Islamabad, and the Development Policy Research Center (DPRC) – Lahore University of Management Sciences (LUMS), Lahore.

Survey questionnaire

Motivated by the considerations described in the introduction to Chapter 2 and benefiting from comments and feedback in the aforementioned consultations, the Lahore Survey Questionnaire was divided into ten sections. These gauged: different aspects of the nature of disputes being litigated; any personal reconciliation or non-court dispute mechanisms explored by the litigants; the nature of the legal remedy being sought; and several additional facets of the litigants' experience with the applicable Pakistani laws and the court system during the course of litigation. More specifically, *section 1* of the questionnaire sought the respondent's personal

and household details. This included information about whether he or she was a plaintiff, applicant, appellant, or respondent and the nature of the court adjudicating his or her case. Apart from recording the respondent's identity and address, it also determined his or her gender, age, religion, sect, ethnicity, caste, profession/occupation, education, and monthly household income. Finally, it also asked about the rough distance between the respondent's home and the court, as well as the respondent's mode of transportation.

Section 2 sought information about the location, nature, and background of the dispute as well as its possible linkages with any crime. *Section 3* sought information about the nature and duration of the legal proceeding. *Section 4* attempted to gauge whether the actual dispute had translated into an adequate legal remedy in the perception of the respondents. *Section 5* evaluated the respondents' perceptions about the status, resourcefulness, and litigation experience of their legal opponents. It further probed whether any attempts had been made by either party to reconcile and, if so, why such reconciliation attempts had not worked. It also explored whether the respondents would be amenable to the possibility of reconciliations in the future and, if so, why. Finally, it attempted to determine whether the respondent had been subjected to any kind of coercion by his or her opponent(s) before or during the current litigation.

Section 6 of the questionnaire explored the respondents' experience of and perceptions about the prevalence and effectiveness of non-court dispute resolution mechanisms in society. *Section 7* evaluated the respondents' experience of various aspects of the legal system, including, inter alia, the language of laws, legal documents, and court proceedings, past experience of litigation, social support systems while pursuing litigation, familiarity with court processes and procedures, cognizance of rights and remedies under the law, as well as perceptions about the capacity of prevalent laws to capture ground realities and peoples' actual problems, their impartiality, and their provision of adequate rights and remedies. *Section 8* shifted the focus to the court system and evaluated the duration of the current litigation, the number of hearings attended and court trips undertaken by the respondent, the gap between hearings, anticipated time span for the verdict, perceptions of delay as well as reasons for delay, plans about going into appeal in case of an adverse outcome, financial outlay on the litigation, availability of legal aid, experience with and perceptions of the performance of judges and court staff, satisfaction with court infrastructure and premises, and any additional impediments to the pursuit of the legal case. *Section 9* focused on the

respondents' experience with and perception of their lawyers. Finally, *section 10* explored respondent preferences for formal and informal forums for resolving any disputes in future, if facing a similar dispute.

Sample universe and size

The sample universe was one that changed on a daily basis as every day presented a more or less completely new set of litigants attending court hearings, with the rare exception of someone who had to return to the court to attend to any unfinished business from the previous day. On any given day, several thousand people visit the Lahore District Courts to attend court hearings or for various related or ancillary purposes. The total number of successful detailed interviews was always going to be a function of the following known and unknown variables: (i) Since the Lahore Survey was conducted with the help of a team of volunteer students, the availability and continuing commitment of the volunteer student surveyors during their winter break from university were a very important consideration. Given the demanding nature of the task, they were therefore divided into two teams so that any given team did not have to survey for more than 5 successive days. As it turned out, invariably all the students not only fulfilled their commitment to work for 5 days, but some even volunteered and worked in the second phase. In doing this, they also overcame various logistical challenges of transportation, staying on in hostels during the holiday break, etc. Their sense of involvement and achievement while conducting the Lahore Survey also helped to boost the number of volunteers in the second phase of the study. (ii) The long and complex questionnaire could turn out to be too intimidating and time-consuming for the respondents to get involved with and respond to. It was calculated and later verified that on average a survey interview could take as long as 40 to 45 minutes to conduct given the length and complexity of the questionnaire and the sensitivity of some of the issues being discussed. (iii) There could be unexpected obstacles, disruptions, or distractions that could halt the survey or bring it to a premature close. As it turned out, some such disruptions and obstacles did contribute to at times slowing down the survey, but fortunately did not disrupt it completely.

Given all of this, the target for the total number of surveys was a shifting one and the initial expectation was to try and complete at least 200 to 250 interviews – which was deemed to be a meaningful sample size given the scope and depth of the inquiries. This was for the

additional reason that the study visualized not just a questionnaire-based data collection exercise, but essentially, and in addition to the same, it entailed detailed interviews with the respondents to obtain their complete narratives and life-experience stories in connection with their disputes and litigation. Thus, the Lahore Survey was a cross between: standard information collection through the mass survey methodology used in economics and politico-economic research for statistical data collection; and detailed field interviews used in sociological and anthropological research for constructing qualitative-information-based contextual understanding of the subject. The fact that the Lahore Survey adduced a total of 440 completed surveys was, therefore, a commendable achievement brought about by the zeal and sense of ownership displayed by the surveyors. Around twenty-one surveys were rejected for being incomplete as the interviewees had to discontinue the interview for some reason. Had a day not been lost due to the tragic assassination of the Governor of Punjab, the study could have reached the milestone of 500 completed interviews.

Survey methodology and phases

The twenty-three-page-long questionnaire had a total of 112 questions. The minimum number of questions that a respondent was supposed to answer, excluding questions that became non-applicable depending on the nature of responses to certain questions, was 98. The questionnaire was in English. It was also translated into Urdu so that the surveyors had an Urdu translation printed beneath the English text. The actual survey was conducted in Urdu and Punjabi. All of the questions were close-ended, with multiple response choices, prepared after extensive consultation, in order to ensure accurate collection of and rich analysis of quantitative data. The multiple choices were not offered upfront to the respondents in order to preclude surveyor or questionnaire bias. However, if the respondent did not understand a particular question, the surveyor read out various possible response options, while also recording any responses that did not fit into available response categories. The surveyors were also instructed to record any important qualitative information when an already listed response was not applicable or when the respondents wanted to narrate their stories in greater detail or reported something that was of relevance to the overall study.

The Lahore Survey was conducted over 9 days spread over the third week of December 2010 and the first week of January 2011. A team of

twenty-two surveyors plus the author conducted the survey. The first phase, spread over five successive days, was conducted in December and involved a team of twelve surveyors plus the author. It resulted in a total of 207 completed questionnaires. There was a gap of 7 days between the first and second phases, which allowed evaluation of the various challenges faced during the first phase and necessary adjustments in research methodology. As a result, some additional response options as well as two additional questions were added. The second phase of the survey, spread over four successive days, was conducted in January and involved a team of fourteen surveyors (the survey team was boosted by some surveyors from the previous team), and also included the author. This too was meant to be a 5-day exercise, but 1 day was lost due to the tragic assassination of the Governor of Punjab, which led to the courts being closed the following day. The second phase generated another 233 surveys, thus resulting in an overall total of 440 completed questionnaires.

Survey team, training, ongoing consultations, and review

The Lahore Survey teams were drawn from undergraduate students at the Lahore University of Management Sciences (LUMS). They were from different disciplinary backgrounds, including law and policy, social sciences (particularly sociology, anthropology, and politics), economics, and accounting and finance. Many of them had some prior experience of qualitative and quantitative field work. However, none of them had undertaken anything similar before in terms of both content and methodology. Neither had they ever visited the Lahore District Courts. Detailed group meetings were, therefore, held prior to the survey in order to provide the students with important background information regarding the research, to familiarize them with the main relevant academic debates in the area, and to explain the Lahore Survey methodology and discuss the questionnaire at length. They were also previously instructed in the background legal sociology, legal anthropology, legal history, legal theory, law and public policy, and law and justice sector reform literature and debates informing this research, as well as in the finer points of civil procedure and litigation and the Pakistani legal trial and trial court system. Furthermore, different possible issues that could crop up during the survey were discussed and standard operating procedures explained to deal with the same. Given that many of the students did not have a background in law, aspects of the Pakistani legal and court

system relevant to the survey were explained at length. Although the questionnaire had been translated into Urdu, given the technical nature of some of the questions, the language was still legalistic. Hence, simpler, everyday substitute language in Urdu and Punjabi was also discussed and agreed upon in order to maximize responses and preclude interviewee incomprehension or intimidation as well as inconsistency in the recording of interviews. The author was present in the Lahore District Courts throughout the 9 days of the survey in order to conduct interviews, but more importantly to address any issues faced by the student surveyors. There were also regular midday and end-of-day meetings during survey days in order to discuss the survey experience and address any issues and queries. On the first day of both phases one and two, the students were divided into groups of two so that one of them could conduct the interviews and the other could record the responses in the questionnaire. On the following days, almost all of the surveyors felt confident enough to conduct the interviews on their own, which greatly helped to speed things up.

The Lahore Survey targeted a random sample of litigants visiting the Lahore District Courts on a regular court day. In order to ensure comprehensive coverage of the different kinds of litigants visiting the courts and thus the available sample universe on any given day, the team members were evenly spread out throughout the two buildings of the Lahore District Courts premises.[1] This also ensured that they did not get in each other's way, attract unwanted attention, or frequent one particular part of the premises, while neglecting others. At the same time, they also kept rotating and swapping places during the course of the day in order to familiarize themselves with different parts of the Lahore District Courts premises. They also kept a tab on each other in order to provide support or assistance should the need arise. The surveyors were instructed to randomly approach any litigants who would be willing to answer questions. The post-survey de-briefing revealed that on any given survey day, on average one to two litigants expressed unwillingness or unavailability to take the interview, as compared to the four to five who agreed to be interviewed. The responsiveness was somewhat higher for female interviewers, as they found it easier to create a zone of comfort

[1] During the second phase of the Lahore Survey, a smaller sub-team also spent part of the day in the nearby complex housing the Additional District and Sessions judges and also the Family Courts, in order to ensure coverage of family court cases.

with the female respondents, while also having the same facility in talking to the male respondents as the male interviewers.

The most common reasons why some respondents declined to be interviewed were that they did not fully comprehend why they were being interviewed or what useful purpose a survey would serve; they were reluctant about taking the risk of openly sharing details of their dispute and legal case history as well as their experiences with the legal and court system with complete strangers; they were too depressed or bitter about their experiences and did not feel like talking to anyone; or they were too preoccupied with an impending court hearing and were trying to track down their lawyer, waiting for the judge, coordinating with other parties or witnesses, getting some information from the court staff or going through their legal papers. An additional factor was the presence of their lawyer or him or her being in close proximity and the respondents' feeling that they should first seek their permission in case they objected to them talking about their case. In some of the cases, the lawyers actually told them not to talk to the interviewers or started interrogating the surveyors about the purpose of the survey. In some other instances, the lawyers expressed no objection or were too preoccupied to raise any objection and hence the interview went ahead. In none of the interviews was the lawyer actually present during the interview, as the surveyors were asked to seek uninhibited feedback from the interviewees.

As opposed to these reluctant interviewees, there were many others who: were openly appreciative of what the survey was trying to achieve and thus wanted to partake; were just bored and found it an interesting distraction; wanted sympathy and also hoped that the interviewers would also extend them some legal advice or assistance; or were very bitter about their experiences and wanted to vent their frustration as well as criticize the failings of the legal and court system. Around twenty-one questionnaires had to be discarded as the interview had to be suspended for one of various reasons. It was either because interviewees got called away by their lawyers or their turn came up in court, they found that they did not want to answer so many questions after all, they found some of the questions either too probing or even potentially risky or scandalous (for instance, when the questions attempted to gauge interviewee perception about the judge's integrity), or they found some of the questions too abstract and difficult to answer (for instance, when interviewees were asked about prevalent practices in society for resolving disputes out of court).

For some of the respondents, the idea of a questionnaire was not alien and hence once they agreed to be interviewed the questionnaire could be completed during the interview. Others, however, especially some of the litigants from Lahore's surrounding rural areas, felt considerably intimidated by someone noting down their responses as opposed to just having a conversation. In view of this, it worked better with them to hear their narrative and fill out the questionnaire later. Invariably, by the time they had narrated their story they had far fewer objections to answering some of the questions requiring specific responses. In view of the complexity and length of the questionnaire, the anxious and high-stress atmosphere of the courtrooms, a natural human reluctance about trusting and speaking openly to unknown people about private legal matters and especially personal views and perceptions about the legal and court system, and also some of the additional court-environment-related obstacles described below, the survey team had a very impressive success rate in terms of persuading people to partake in the long interview. The fact that they were students – young, earnest, and genuinely interested and empathetic – actually made them come across as more trustworthy than surveyors from professional survey companies or the more typical investigative journalists.

Survey challenges

The Lahore Survey team had to face several challenges during the course of the survey. The foremost was the generally chaotic and crowded environment of the court premises described in Chapter 2. An additional challenge was posed by the fact that sixteen of the twenty-two surveyors were females. Quite a few of them were initially anxious about their capacity to be able to approach and successfully interview litigants in what appeared to be a forbidding environment. While their involvement in the survey presented the obvious advantage of better access to female litigants, they also had to demonstrate greater perseverance in what is a predominantly male-dominated environment, despite the presence of a not insignificant number of female lawyers. On a few occasions, some of them also had to ward off unwanted attention from some of the younger male lawyers. A couple of them were persistently pursued by some lawyers who asked for their cell phone numbers and insisted that they join them for a glass of fruit juice. When polite evasion did not work, they informed their admirers that their professor was zealously fond of free fruit juice and would deeply begrudge not

being invited. Enthusiasm temporarily curbed, they retreated to try their luck another day. It was invariably the very next one.

In addition, more or less all the students were approached at one stage or another by some over-curious lawyers interested in finding out what they were up to or others who did not take kindly to our "intrusion" into their "clients'" confidences. In some cases, they expressed their suspicion that the Lahore Survey was meant to undermine them and their work or had some other secret agenda. In a few cases, some rather hostile lawyers demanded a copy of the questionnaire in order to determine to their "satisfaction" that the survey was indeed part of an academic study and thus could be allowed to go ahead. The questionnaire, however, was not shared with them, as it contained a section gauging litigants' experience with their lawyers. It was highly likely that some lawyers would object to it and thereby potentially create a ruckus and disrupt the study. Some of the lawyers also tried to discourage the surveyors by saying that the study was going to achieve nothing and that the system was too corrupt and dysfunctional to reform. Others were more dramatic and said that the Lahore Survey seemed to them like a covert attempt to discredit lawyers, but that any attempt to undermine the "might of the lawyers" would come to nothing. The students, however, did an admirable job of politely warding off the over-curious, intrusive, skeptic, and intimidating. When faced with any of the these attitudes, they followed instructions and calmly explained the project and then diplomatically stepped away to another part of the court premises to resume their work, particularly if they thought that they were attracting unwanted attention and possible disruption of work.

The months during which the Lahore Survey was conducted are the coldest in Lahore and, especially during the second phase, early daytime temperatures dropped to 3 or 4 degrees Celsius.[2] The days were invariably overcast and gloomy. The general state of melancholy was accentuated by the fact that the court premises have minimal basic facilities (described in Chapter 2). The extreme cold and general gloominess contributed both to a lower than usual number of litigants as compared to summer months and a general tendency to huddle and crouch in corners and thus be generally unapproachable. This made the task of

[2] Although highly challenging, these months are still more bearable than the hot weather in others. The additional reason why the survey was conducted during these months was that around this period students were available during their winter break from university to participate in the project.

approaching people and striking a conversation all the more daunting. The constant bustle, crowds, and at times unsavory characters who frequent such places added to the already closed, suffocating, and unappetizing mood of the place.

Survey finalization, data entry, quality check, and qualitative feedback

At the conclusion of the Lahore Survey, the next 10 days were spent individually examining in detail each of the 440 completed questionnaires (plus the eventually discarded twenty-one questionnaires) in order to identify any missing, contradictory, or unclearly recorded information.[3] The surveyors had been asked to record portions of the narrative whenever they felt that they or the interviewee was unclear about his or her response to a particular question. Furthermore, they were asked to record any qualitative feedback where the interviewees' narrative adduced significant additional information that required capturing as it fell within the ambit of the study or where it contained a poignant remark that encapsulated their experience with the legal and court system. This recorded information came in very handy for addressing any incomplete portions of the completed questionnaires; as did follow-up conversations with the surveyors. Many of the respondents had agreed to provide their contact details and in a few cases a follow-up phone conversation adequately addressed any remaining lack of clarity.

While the above exercise took place, finalized questionnaires were forwarded to a team of ten volunteers for data entry, which took

[3] In terms of the basic breakdown of the randomly selected survey population, of the 440 respondents, around 42 percent were plaintiffs, around 25 percent were applicants, around 4.5 percent were appellants and the remaining 28.5 percent were respondents. In terms of the court of adjudication where these respondents were contesting their cases, around 77 percent were appearing before civil judges of different monetary jurisdiction, another 15.5 percent were appearing before family court judges, and the remaining 7.5 percent were appearing before guardian court judges. Although the questionnaire also asked the respondents about their religion, since 99 percent reported Islam, religion was not used as a variable for further analysis and evaluation. Similarly, almost 98 percent reported "Sunni Islam" as their sect and "Punjabi" as their ethnicity, and hence these two personal variables emerged as statistically insignificant for purposes of any further disaggregated analysis. The respondents did report many different castes in response to a question about the same. However, caste too emerged as an insignificant personal variable in subsequent questions and was hence dropped as an evaluative variable in the analysis.

approximately another 10 days. Once all the data had been entered, two additional quality control exercises were undertaken. The first involved a specific scrutiny of responses to certain questions that allowed for multiple responses and had been identified during the data entry as the cause of inconsistencies or errors. The entire data for all of these questions was rechecked to address any inconsistencies or errors in data coding and entry. Furthermore, forty-four completed questionnaires (10 percent of the total number of completed surveys) were randomly selected (while ensuring that a proportionate number of questionnaires was randomly chosen from the questionnaires assigned to the ten data entry volunteers) and re-examined for accuracy of data entry. In addition, another team of volunteers sifted through all the questionnaires and chose those that reported any additional and significant qualitative feedback and then classified the same according to different response categories. This qualitative information was then incorporated into the explanatory narrative. The finalized data set, on the other hand, was statistically analyzed using SPSS – a special statistical analysis program – in order to gauge significant statistical correlations with the various personal and household variables mentioned above.

Appendix 2

The Punjab Crime Perception Survey: background and methodology

About the survey: ambit and significance

The Crime Survey is the first empirical attempt at an independent evaluation of crime incidence and perception in the Punjab, hence its value is immediately apparent. Policy and regulatory deliberations and choices in terms of the improvement in the performance of the police and other state institutions entrusted with crime prevention, investigation, and conviction cannot be, as they currently are, based solely on official data on the incidence as well as prevention of crime. While the latter serve as an important source of information, the accuracy and exhaustiveness of official crime data needs to be evaluated through additional credible sources. By going directly to the end-users and beneficiaries of the state law enforcement institutions, i.e. the citizens, the Crime Survey attempted to both: provide a highly beneficial information database to determine if there is indeed a gap between the official narrative on crime and what the people actually experience, perceive, and have to say; and furnish additional credible empirical information to better inform policy and regulatory deliberations and directions. Thus, the Crime Survey served the dual purpose of a potential check on the quality and veracity of official statistics, and providing important insights on crime in society for more effective regulation and policy-making.

While the above is of obvious value, the survey also attempted to achieve quite a bit more. Crime is a complex sociological phenomenon and cannot be analyzed without contextualizing its occurrence and individually breaking down and analyzing the several variables contributing to its incidence. Nowhere in the world are the vulnerability to and victimization by crime consistent across the board. Several regional, local, and individual factors contribute to such vulnerability and victimization. Therefore, the mere reporting of a possible gap between the official statistics on crime and what people perceive, experience, and have to say on the subject is useful, but in a rather limited sort of a way. What is

necessary, therefore, is to further determine which geographical areas and localities are more prone to crime and what kinds of crime. Similarly, a truly incisive approach would necessitate a determination of which household and individual characteristics contribute to the empowerment of certain people over others and hence less vulnerability to and victimization by crime; and conversely, household and individual factors that create and perpetuate disempowerment and the resulting vulnerability to and victimization by crime. From a policy perspective, it is moot that informed policy deliberation is highly unlikely without a systematic collection of disaggregated common perceptions as well as particularized perceptions according to household and individual characteristics, on the incidence, growth, nature, and motives of crime, as well as the efficacy of various crime control measures used by the police. Among other things, such policy deliberation would be extremely important for the identification of any gaps between citizens' expectations and existing police practices and thereby the facilitation of informed decision-making to improve delivery of policing services in the province. Given the Punjab's tremendous social, cultural, and economic diversity, as well as the dispersed geographical concentration of its population in areas with diverse socio-economic conditions, this is a complex task. The Crime Survey made a rigorous attempt to capture the diversity and complexity of the Punjab within its ambit and methodology.

Survey design, sample selection, and survey methodology

Selecting a representative survey sample from the Punjab's large and diverse population was a huge challenge. The sample size was 2,200 households – significant in terms of the detailed information it was likely to adduce and also the considerable effort required to conduct even a survey of this size over such a vast and populous region.

In order to ensure that the sample for the Crime Survey was adequately representative of the diversity of the province along several important variables, one possible prudent strategy was to reduce this vast and diverse population into a more manageable and yet highly representative dataset, which could then be used for onward selection of a more realistic and yet meaningful sample universe for the Crime Survey. Employing this strategy, the database and results of an extensive, regular, and reliable existing socio-economic survey – the Multiple Indicator Cluster Survey (MICS), which is a regularly conducted government survey of all households in the Punjab – were utilized. The most recent

MICS was conducted in 2008 and therefore provides an almost contemporary, extensive, and yet manageable database of the population of the Punjab, disaggregated according to various important regional and socio-economic factors.[1] Since MICS is a household survey that furnishes considerable useful information along various household-based socio-economic performance indicators, the additional advantage of this approach was that it readily furnished significant, already-recorded household information relevant to the Crime Survey. This information could thus be further supplemented through additional information acquired through the questionnaire designed for the Crime Survey.

Accordingly, all the tehsils and towns in the Punjab, as listed in the MICS, constituted the sample universe for the Crime Survey. The basic unit of analysis for the MICS, as indicated above, is the household (the particular family occupying a dwelling in the Punjab at the time the most recent MICS took place, i.e. 2008). After having decided to use all of the tehsils and towns listed in the MICS 2008 as the sample universe for the Crime Survey, the question remained which of these were representative of the Punjab's overall socio-economic diversity. The tehsils/towns were, therefore, further stratified on the basis of their socio-economic ranking, based on governmental statistics, into the three tiers of "better performing," "average performing," and "less performing" tehsils/towns. They were even further stratified on the basis of their geographical location into the three diverse geographical regions of the Punjab – a classification

[1] The survey population for MICS consists of all the households and their members in all the urban and rural areas in the Punjab, as defined in the updated Census of Population and Housing, 1998. Areas including military installations and temporary residential arrangements by the homeless are, however, excluded from the MICS survey population. The sample selection for the MICS is conducted in two stages. Enumeration Blocks (EBs) and individual villages are the first-stage selection units. The Federal Bureau of Statistics has divided every city/town in the province into a number of EBs. EBs are small, compact areas with an average of 200–250 households in a city/town. Each EB is further stratified as a low-, medium-, or high-income area on the basis of quality of housing and the living standards of the household in that EB. At present, 14,654 EBs exist in the province, all of which are covered under the MICS survey population. As for the rural areas, every Punjabi village is taken as a self-representing unit. No socio-economic stratification is conducted in the rural areas, as villages are considered to be reasonably homogenous. In the second stage of MICS, from each first-stage selection unit (EB and village), twelve households are selected in the urban areas, while sixteen households are selected in the rural areas, using the systematic random sampling technique. The tehsil/town is kept as the smallest domain of estimation for the MICS. Further details on the design of MICS are available in the MICS report. See Multiple Indicator Cluster Survey (MICS) Punjab 2007–08, Vol. I (Bureau of Statistics, Government of the Punjab, 2009).

which is also regularly used to broadly differentiate on the basis of socio-economic indicators. These are northern, central, and southern Punjab. Southern Punjab is looked upon as the least and central Punjab as the most socio-economically developed region in the Punjab. Finally, the tehsils/towns were yet again stratified on the basis of where they were situated on the rural–urban spectrum. Four tehsils/towns were then randomly selected on the basis of these stratifications. As is apparent, all of the above stratifications highlight important overall variables that influence the socio-economic empowerment, or lack thereof, of the households in the Punjab.[2]

After selecting the tehsils/towns according to the above-described method, the already surveyed households in these tehsils/towns under the MICS comprised the sample universe for the Crime Survey. Since the Bureau of Statistics, the Punjab has developed a complete listing of all households surveyed during the MICS, the same was used for the identification of sample households for the Crime Survey. In other words, all households of the selected tehsils/towns which were used as a sample for the MICS thus constituted sample households for the Crime Survey as well. This was meant to ensure that the results are representative for the tehsil/town studied in the Crime Survey. This listing was made available to the surveyors conducting the Crime Survey. Given the safe assumption that the sample households selected for the MICS were fully

[2] In order to ensure that each of these criteria was adequately represented in the survey, a two-stage selection process was adopted. This involved, at the first stage, the selection of a tehsil (towns not included) from the "lower performing" stratum through random selection on an equal probability basis (through drawing of lots). Next, the same method was applied for the selection of one tehsil from the "average performing" stratum. If such randomly selected teshil belonged to the same geographical region as the tehsil selected from the "lower performing" category, the drawing of lots was repeated until a tehsil from another geographical region was selected. The same approach was adopted for the selection of a tehsil from the "higher performing" stratum. With reference to the need for sample stratification on the basis of location on the rural–urban spectrum, the households surveyed under the MICS can be distinguished as those falling in the "major urban areas," "other urban areas," and "rural areas." The same classification was used to obtain a good mix of households along the rural–urban spectrum. While almost all the tehsils in Punjab represent a good mix of households falling under the "other urban areas" and "rural areas," the households in the "major urban areas" are located only in the towns. Not all towns, however, comprise purely "major urban areas." Since rural households were already well represented in the selected tehsils, it was important to include the towns with a primarily urban population or "major urban areas" in the survey population. Out of the seven such towns comprising purely "major urban areas," one was randomly selected on an equal probability basis.

representative of the respective tehsils/towns, it could, therefore, be predicted with a high degree of confidence that the results obtained from the Crime Survey would fairly accurately represent the explored trends prevailing in the sample tehsils/towns – in turn providing a reasonably reliable insight into the trends which were likely to prevail across the Punjab. In conclusion, the four selected tehsils/towns for the Crime Survey, according to socio-economic performance, geographical location, and placement on the rural–urban spectrum, are listed below.

Sample tehsil/town	Socio-economic performance
Kehror Pacca	Lower performing
	Southern Punjab
	Rural/other urban
Potohar Town	Average performing
	Northern Punjab
	Rural
Wazirabad	Higher performing
	Central Punjab
	Rural/other urban
Samanabad Town (Lahore)	Average performing
	Central Punjab
	Major urban

In terms of sample selection, the identification of alternate sample households could become necessary in case the original selected sample household was absent, or did not wish or was otherwise unable to participate in the Crime Survey. In such cases, the household appearing next to such an original sample household in the household listing for that EB/village was selected. In case a similar problem also occurred with the alternate sample household, the household appearing earlier to the original household in the listing was selected. In order to compensate for any bad data, a 5 percent reserve sample was also selected from the MICS household listing. The reserve sample was over and above the required sample size. The information collected from households on the reserve sample list was only to be used in order to replace incomplete or unreliable information.

The Crime Survey was conducted through structured interviews based on a prepared questionnaire of any adult respondents from the sample

households. The questionnaire covered several important aspects of the various queries that have been briefly described above and discussed in Chapter 3. It was not mandatory to interview the head of the household – any available and willing member could be interviewed. The respondents were to be identified through cold calling. However, educated family members were to be preferred owing to a greater likelihood of them being able to answer all the questions in the questionnaire. The questionnaire was translated into Urdu. The actual interviews were conducted in Urdu and Punjabi by surveyors from a professional survey firm. The surveyors received special training for this purpose regarding various aspects of the questionnaire – the overall survey purpose, design, and methodology, and important local and contextual aspects – in order to avoid errors, data bias, and possible constraints and challenges. The information collected from the respondents was recorded by the surveyors in their own hand in the space provided in the questionnaire forms.

The Crime Survey was conducted from November 2009 to February 2010. The four tehsils/towns were sequentially covered, starting with Potohar Town, moving on to Kehror Pacca, then Wazirabad, and finally Lahore. To ensure data integrity and quality, the surveyors worked in teams. Each team comprised two surveyors, one of whom was a female. A supervisor oversaw and guided the work of the three survey teams working in a locality. The surveyors were selected on the basis of suitability of education, and the supervisors were mandatorily required to have previous fieldwork survey experience. Previous contacts with local government officials, and also familiarity with the layout of the selected areas and local population, were also emphasized while selecting the team. In order to ensure a timely identification of any errors, completed questionnaires were reviewed by the supervisors on site at the end of each survey day. This allowed for the possibility of follow-up/re-interviews to rectify any issues. The finalized surveys were then further analyzed for any discrepancies or errors by additional survey experts at the survey firm. The field data was tabulated on a daily basis. At the completion of the survey, the data was analyzed using SPSS – a special statistical software – after a final scrutiny for any errors, missing entries, inconsistencies, or outliers.

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